In the

Supreme Court of the United States

October Term, 1976

No. 76-873

ARTHUR ANDERSEN & CO.,
Petitioner,

v.

STATE OF OHIO, THE HONORABLE SHERMAN G. FINESILVER, UNITED STATES DISTRICT JUDGE, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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AUTHORITIES CITED

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Arthur Andersen & Co. ("Andersen") petitions for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review a judgment of that court entered December 1, 1976 in four consolidated appellate proceedings (three appeals and a petition for a writ of mandamus and prohibition pursuant to 28 U.S.C. §1651).

OPINION BELOW

The Court of Appeals' opinion dismissing the appeals and declining to issue the requested writ of mandamus and prohibition (Appendix B, pp. 21-29) is not yet officially reported.

*Respondents include all defendants in the underlying civil action, *State of Ohio v. Crofters, Inc., et al.*, Civil Action No. C-4628 (D. Colo.), the caption of the complaint of which is Appendix A, pp. 18-20.

JURISDICTION

The judgment and opinion of the Court of Appeals sought to be reviewed were entered on December 1, 1976 in *State of Ohio v. Arthur Andersen & Co.* (Nos. 76-1632, 76-1633 and 76-1710 (appeals)) and *Arthur Andersen & Co. v. Honorable Sherman G. Finesilver, et al.* (No. 76-1618 (petition for mandamus and prohibition)). The jurisdiction of this Court to review the instant case is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether it is error, or an abuse of power, for a United States District Court to enter a discovery order, with the attendant threat of sanctions under Rule 37, F. R. Civ. P., for noncompliance, directing a defendant to make discovery of documents and information in the possession of defendant's personnel in an office of defendant located in a friendly foreign country when (a) the laws of that country prohibit the making of such discovery and provide for the imposition of serious criminal penalties and civil sanctions upon those who violate such prohibitions, and (b) the defendant directed to comply with the discovery order is a firm based in the United States operating in the foreign country through offices located therein, the documents and information at issue were generated or obtained in a confidential relationship by personnel of defendant located in an office of defendant in the foreign country in the ordinary course of providing services to foreign nonparty businesses, and the defendant and its personnel located in the foreign country are subject to the prohibitions, penalties, and sanctions of the criminal and civil laws of that country.

STATUTES INVOLVED

The statutes involved, which are set forth in Appendix C, pp. 30-39, are:

Statutes of the United States:

28 U.S.C. §1291 (U.S. Code, Vol. 7, p. 7562)
28 U.S.C. §1651 (U.S. Code, Vol. 7, p. 7601)

Penal Code of Switzerland:

Article 35 (Recueil Systematique du Droit Federal, Book 1, p. 9)
Article 36 (R.S.D.F., Book 1, p. 9)
Article 48 (R.S.D.F., Book 1, pp. 19-20)
Article 162 (R.S.D.F., Book 2, p. 57)
Article 273 (R.S.D.F., Book 2, pp. 89-90)

Rules:

Rule 34, Federal Rules of Civil Procedure (U.S. Code, Vol. 7, p. 7793)
Rule 37, Federal Rules of Civil Procedure (U.S. Code, Vol. 7, pp. 7798-99)

STATEMENT

This case presents for review the entry of a judgment and opinion by the Court of Appeals for the Tenth Circuit dismissing appeals, and denying a petition for a writ of mandamus and prohibition, filed by Andersen and requesting the reversal of a series of pre-trial orders entered by the district court which directed Andersen to make discovery of documents and information in the possession of Andersen's personnel in its office located in Geneva, Switzerland, in violation of the criminal and civil laws of that friendly, foreign, sovereign state.

Andersen is a partnership of independent public accountants headquartered in Chicago, Illinois that has offices and conducts its practice throughout the United States and in numerous foreign countries. It is thus subject not only to the laws of the United States, but also to

the laws of the foreign countries in which it conducts its public accounting practice.

The question presented arises from a conflict between Andersen's duty to comply with the criminal and civil laws of Switzerland (one of the countries where it conducts its professional practice), and discovery orders of a United States District Court which ordered Andersen to make discovery of documents and information in the possession of its personnel in its Geneva, Switzerland office in violation of those laws.

This case was instituted on April 17, 1972 when Respondent State of Ohio ("plaintiff") filed a complaint in the United States District Court for the Southern District of Ohio, alleging violations of federal and state securities laws and common law fraud by Andersen and others, including King Resources Company ("KRC"). On November 17, 1972, the Judicial Panel on Multi-District Litigation transferred the case to the District of Colorado for coordinated pretrial proceedings with other cases arising out of the affairs of KRC. *In re King Resources Company Securities Litigation,* 352 F.Supp. 975 (J.P.M.L. 1972).

On May 27, 1976, at a late stage in the discovery proceedings, the district court (Honorable Sherman G. Finesilver, Judge) entered the first of the three discovery orders subsequently challenged by Andersen on appeal and by petition for writ of mandamus and prohibition. In this order the court granted plaintiff's motion, filed pursuant to Rule 37(a), F.R. Civ. P., to compel Andersen to produce documents and furnish information in the possession of Andersen's personnel in its office located in Geneva, Switzerland—which documents and information had been obtained or generated and maintained by Andersen's personnel in that office prior to the filing of this action in the normal course of examining and reporting on the financial

statements of foreign businesses. The court's May 27, 1976 order reads:

> "3) Motion for discovery of certain documents of Andersen & Co. in Geneva Office is granted . . ." (District Court Docket, p. 12, May 27, 1976; Appendix D, p. 40).

Andersen had opposed plaintiff's motion, in pertinent part, on the grounds that the order sought would require Andersen and its personnel living and working in Switzerland to violate the criminal and civil laws of Switzerland, and therefore as a matter of law the district court could not properly enter such an order. Andersen had previously submitted to the district court a detailed opinion of Swiss counsel (Appendix E, pp. 41-76) which explained the applicable laws of Switzerland and concluded unequivocally that an order compelling the discovery of documents and information located in Switzerland would expose Andersen's personnel to the imposition of serious criminal penalties (including imprisonment) and would expose Andersen and its personnel to civil sanctions under Swiss law. Plaintiff had neither contradicted nor challenged the opinion of Swiss counsel retained by Andersen. Thus, when the district court entered its May 27, 1976 discovery order it was perfectly clear that the order would require Andersen and its personnel to violate the laws of Switzerland; but, from all that appears in the record the district court did not address the problem. Furthermore, the court simply directed Andersen to produce; the order was not conditioned on Andersen being able to comply without violating the Swiss laws in question.

In brief summary, the Swiss criminal and civil laws involved provide that non-public documents and information obtained by accountants in the course of performing accounting and auditing work in Switzerland constitute the "business secrets" of the accountants' clients and of others to whom such information relates. Such information may

not be disclosed by the accountants to others, without the authorization of all persons who are considered as having a "legitimate interest" in the protection of the confidentiality of such information, including any state interests of Switzerland. Persons who have such a "legitimate interest" include the clients of the accountants and third persons whose affairs are reflected in the documents or information, as well as Switzerland itself if state interests may be involved. The Swiss law provides that the unauthorized disclosure of protected information can result in the imposition of serious criminal penalties upon Andersen personnel involved in or responsible for making such disclosures, even if made under the compulsion of an order of a United States court; the government license held by Andersen's Swiss office to perform bank, mutual fund and certain other types of auditing in Switzerland would be subject to revocation; and Andersen and its personnel would be exposed to civil liability to persons arguably damaged by the disclosures. (Appendix E, pp. 41-76).

Following entry of the May 27, 1976 order Andersen initiated efforts — which continue to date — to obtain the numerous authorizations which would be essential to enable it to comply with the district court's order without violating Swiss criminal law. Thus far Andersen has been unsuccessful in obtaining all of the necessary authorizations to produce numerous documents covered by the court's orders, and it appears that certain authorizations required will not be forthcoming. Andersen also filed a motion requesting the district court to reconsider its order and establish a schedule and procedures pursuant to which Andersen would take all reasonable steps to comply with the court's discovery order, *short of those which would violate Swiss law.* By order dated June 25, 1976, the district court denied Andersen's motion, stating, *inter alia,* "This Court is not of a view to establish or supervise a detailed blueprint for the discovery procedures in this regard." (Appendix F, pp. 77-78).

Having failed in its efforts to reach an accord with the district court, its time to appeal from the May 27 order running out, and no other avenues being available for reconciling the untenable position in which it had been placed, Andersen, on June 28, 1976, filed a notice of appeal from that order under the collateral order doctrine enunciated in *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). The first of the four appellate proceedings (ultimately consolidated) leading to the judgment and opinion by the Court of Appeals here sought to be reviewed was thus initiated.

Despite the pendency of Andersen's appeal from the May 27, 1976 order the district court continued to exercise jurisdiction over this Swiss discovery matter, most significantly by entering the two additional orders directing discovery of such Swiss documents and information of which Andersen subsequently sought appellate review. Those orders (see Appendices G and H, pp. 79-84 and 85) entered on July 2, 1976 and on July 23, 1976, differed from the May 27, 1976 order only in that (1) they established "deadlines" for compliance — July 12, 1976 and August 19, 1976, respectively — and (2) they provided that Andersen was to produce certain of the documents for the court's *in camera* inspection. But, as established by a supplementary uncontested opinion of Swiss counsel submitted to the district court on July 9, 1976 (Appendix I, p. 86) an unauthorized disclosure of material deemed secret under Swiss law constitutes a violation of Swiss criminal and civil law *even if* the disclosure is limited to examination by a court. Accordingly, the district court's July 2, 1976 and July 23, 1976 orders suffered from the identical infirmity which affected the May 27, 1976 order: they required Andersen and its personnel to act in violation of the criminal and civil laws of Switzerland.

Contemporaneous with its entry of those supplementary discovery orders, the district court, although apprised by

Andersén of the progress it was making in its efforts to comply with the discovery orders *and with* Swiss criminal law, and of the problems which remained (and again despite the pendency of Andersen's appeals), invited and conducted a hearing upon plaintiff's motion to impose sanctions upon Andersen for its failure to comply fully with the requested discovery. (Appendix J, p. 87). Plaintiff there requested the court to enter a number of findings of fact—which facts would substantially establish the most important allegations against Andersen made in plaintiff's complaint—and to bar Andersen from introducing evidence in contradiction of those facts. On July 22, 1976, the first day upon which hearings were conducted by the district court on this matter, the court reflected its receptivity to the motion, commenting, *inter alia,* upon "the vast, strong power that the Court has even to dismiss a case." (Appendix K, p. 88). On the following day, during continued hearings on plaintiff's motion to impose sanctions, the district court was informed that the Court of Appeals had granted Andersen's motion for a stay pending dispositon of its appeals and petition for writ of mandamus and prohibition; plaintiff's motion for sanctions is, thus, still extant.

In addition to Andersen's appeal from the district court's May 27, 1976 order Andersen prosecuted two other appeals: on July 9, 1976 it filed a notice of appeal from the district court's July 2, 1976 order; on July 13, 1976 it filed a Petition for a Writ of Mandamus and Prohibition ("Andersen's Petition"); and on August 4, 1976 it filed a notice of appeal from the order of July 23, 1976. After consolidating the appeals and petition for writ of mandamus and prohibition (and, in effect, granting Andersen's motion to amend its Petition to include therein requests for relief as to all three discovery orders entered by the district court), the Court of Appeals heard argument and on December 1, 1976, issued the judgment and opinion here sought to be reviewed. (Appendix B, pp. 21-29).

In its opinion, the Court of Appeals, while acknowledging the exception to the finality requirement of 28 U.S.C. §1291 constituted by the "collateral order doctrine," held that that principle did not apply in this case and, therefore, dismissed Andersen's three direct appeals on the grounds that the orders appealed from were not appealable. In dealing with Andersen's Petition, the Court of Appeals confronted the merits of the question raised by Andersen which was central to all appeals, but held that Andersen was wrong and that the district court's entry of orders directing a violation of foreign law did not constitute an abuse, or usurpation, of power. The Tenth Circuit rejected a directly contrary line of decisions of the Second Circuit—*Trade Development Bank v. Continental Insurance Co.,* 469 F.2d 35 (2d Cir. 1972); *United States v. First National City Bank,* 396 F.2d 897 (2d Cir. 1968); *Application of Chase Manhattan Bank,* 297 F.2d 611 (2d Cir. 1962); *Ings v. Ferguson,* 282 F.2d 149 (2d Cir. 1960); *First National City Bank v. Internal Revenue Service,* 271 F.2d 616 (2d Cir. 1959), *cert. denied,* 361 U.S. 948 (1960)—and held instead that "Foreign law may not control local law. It cannot invalidate an order which local law authorizes" (Appendix B, p. 27), and that the fact that compliance with a discovery order could lead to the imposition of criminal penalties under foreign law is entirely irrelevant to the validity of the order. (*Ibid.*).

REASONS FOR GRANTING THE WRIT

1. This case squarely presents the question whether it is lawful for a United States District Court to enter an order (with the attendant threat of sanctions if not fully complied with) directing a defendant to make discovery of documents and information in the possession of defendant's personnel in its office located in a friendly, sovereign foreign state which documents and information were generated or obtained in a confidential relationship

by personnel of the defendant in defendant's office located in that foreign country in the ordinary course of providing services to foreign non-party businesses, when compliance with that order would require the violation of the foreign state's *criminal* and civil laws and would subject the defendant and its personnel to *severe criminal* penalties and civil sanctions.

It is Andersen's position that it is error, and an abuse or usurpation of power, for a court to enter such an order. Any rule to the contrary would offend principles of international comity — recognized by the United States — which require sovereign states to respect the integrity of the domestic laws and public policies of foreign sovereign states and, in addition, would be incompatible with and injurious to the political and economic interests of the United States which are furthered by international trade and commerce.

Even more fundamentally, any rule to the contrary would simply be unfair: a plaintiff benefited by such an order (and by any sanctions ultimately imposed by a court for a failure to comply fully with it) would be granted a "windfall" resulting from bringing suit against a defendant subject to the prohibitions, penalties and sanctions of a foreign country's laws; a defendant subject to the court's sanctions would be punished for matters entirely beyond its control.

Nor are there any "equities" presented by this case which favor the adoption of a rule to the contrary. A rule that Andersen cannot be ordered to do (and then sanctioned for failing to do) what it is prohibited by foreign law from doing, does not deprive the plaintiff of exercising its right — as it in fact already has done — of securing the offices of the court to compel Andersen to do *whatever is lawfully permissible*. Nor does a recognition of Andersen's

obligations under foreign law hamper plaintiff's right to secure possibly relevant evidence any more than does recognition of other exceptions to discovery, *e.g.*, the attorney-client privilege; indeed, less so, since plaintiff remains free to make its own efforts to remove this particular impediment to discovery. Moreover, Andersen has not invoked the aid of the court to enforce any claim; Andersen is a defendant in this case. Andersen is not a plaintiff who might be deemed to have waived rights, or jeopardized otherwise legitimate claims, because of having instituted the litigation, *i.e.*, "invok[ed] the aid of a court to vindicate rights asserted against another." *Societe Internationale v. Rogers*, 357 U.S. 197, 210 (1958).

Andersen has been brought to court by another party. That party has requested the production of documents which Andersen cannot produce without violating the *criminal* laws of Switzerland. Andersen, meanwhile, is inextricably caught between the Scylla of obedience with Swiss law/disobedience of the court's orders and the Charybdis of disobedience of Swiss law/compliance with the court's orders. Andersen's position simply is that an order which places a defendant in such a position is contrary to law.

We believe that until the entry of the discovery orders of the district court here, and the entry of the judgment affirming those orders by the Court of Appeals for the Tenth Circuit, all relevant judicial precedent in this country supported Andersen's position. See *Trade Development Bank v. Continental Insurance Co.*, 469 F.2d 35 (2d Cir. 1972); *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968); *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962); *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960); *First National City Bank v. Internal Revenue Service*, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960). Indeed, in those cases the important

principles we advocate here have been espoused in unequivocal and uncompromising language—for example:

> "Finally, the Bank argues that production of the branch's records located in Panama would require action by personnel in Panama in violation of the constitution and laws of Panama. *If such were the fact we should agree that the production of the Panama records should not be ordered.*" (*First National City Bank v. Internal Revenue Service, supra,* 271 F.2d at 619; emphasis added);

and,

> "Upon fundamental principles of international comity, *our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor* or, at the least, an unnecessary circumvention of its procedures." (*Ings v. Ferguson, supra,* 282 F.2d at 152; emphasis added).

The settled law thus appears to be that the entry of an order directing discovery in violation of foreign law is improper.

In this case both lower courts have repudiated these principles. For example, during a hearing conducted in respect of plaintiff's motion for the imposition of sanctions upon Andersen for its failure to comply fully with the previously-ordered discovery of documents and information located in Switzerland, the district court explained its July 23, 1976 order directing such discovery as follows:

> "Now, I want it clearly understood that the 19th of August is the cutoff date. The cutoff date is tonight for documents that you can get by tonight, but in any event, with or without consents, the Court wants full compliance by the 20th of August." (Appendix L, p. 89).

Under the applicable laws of Switzerland, which were fully

briefed by Andersen (with an extensive and uncontradicted opinion by Swiss counsel) before the district court, if Andersen were to produce any of the protected documents in question "without consents," *i.e.,* authorizations from those persons (in this case, mainly foreign entities, and all entities independent and wholly beyond the control of Andersen) who have the right under Swiss law to insist upon the confidentiality of the documents, Andersen's personnel would be subject to serious criminal penalties and civil sanctions and Andersen would be subject to civil sanctions. Nevertheless, the district court, *fully aware* of those Swiss legal provisions, directed Andersen to act in violation of them.

The Court of Appeals for the Tenth Circuit has even more expressly repudiated the principles advanced by Andersen here and recognized consistently by courts in other cases:

> "We are not impressed by Andersen's contention that international comity prevents a domestic court from ordering action which violates foreign law . . .
>
> "An anomalous situation with great potential effect would result from recognition of the right of a litigant to avoid discovery permitted by local law through the assertion of violation of foreign law. Foreign law may not control local law. It cannot invalidate an order which local law authorizes." (Appendix B, p. 27).

This decision by the Court of Appeals is, we submit, not merely "in conflict with *the decision* of another court of appeals on the same matter" (Rule 19(1)(b) of the Supreme Court Rules; emphasis added), but in fact conflicts with the entire series of decisions by the Court of Appeals for the Second Circuit cited above.

2. This Court has once before concluded that a decision which bore upon the relationship between, and recon-

ciliation of, the orders of domestic courts and the laws of foreign, friendly, sovereign states raised "important questions as to the proper application of the Federal Rules of Civil Procedure" which warranted review and consideration by this Court upon a petition for writ of certiorari. *Societe Internationale v. Rogers,* 357 U.S. 197, 203 (1958).

In *Societe Internationale* this Court implied that in the absence of the extraordinary facts there present (*e.g.,* that the petitioner was a Swiss entity and thus "in a most advantageous position to plead with its own sovereign for relaxation of penal laws" [357 U.S. at 205], and that the documents which were not produced "might prove to be crucial in the outcome of this litigation" [*id.* at 201]*), a holding that a United States court could not properly order a party to effect discovery in violation of foreign law would be appropriate:

> "In view of these considerations, to hold broadly that petitioner's failure to produce the Sturzenegger records because of fear of punishment under the laws of its sovereign precludes a court from finding that petitioner had 'control' over them, and thereby from ordering their production, would undermine congressional policies made explicit in the 1941 amendments [to the Trading with the Enemy Act], and invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records . . .
>
> *"We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control. Rule 34 is sufficiently flexible to be*

*By contrast, in this case during the July 23, 1976 hearing on plaintiff's motion to impose sanctions upon Andersen for its failure to comply fully with the Court's orders, the district court referred to the "peripheral" bearing to the case of the discovery ordered. (Appendix L, p. 89).

> *adapted to the exigencies of particular litigation.* The propriety of the use to which it is put depends upon the circumstances of a given case, and we hold only that accommodation of the Rule in this instance to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing this production order." (357 U.S. at 205-206; emphasis added).

Here Rule 34 has not been flexibly "adapted to the exigencies of particular litigation." It has been applied in an inflexible manner, with no recognition that compliance with discovery orders issued under it would require a defendant to choose between being punished in the United States for failure to comply fully with those orders or being punished in Switzerland under the *criminal* law because it did fully comply with those orders.

Surely this is not the way the law should develop in the lower courts in light of this Court's opinion in *Societe Internationale* (and indeed, as noted above, not the way the law as expressed in the post-*Societe Internationale* decisions of the Court of Appeals for the Second Circuit cited at pages 11-12, *supra,* has developed). Thus, in the language of Rule 19(1)(b) of the Supreme Court Rules, the Court of Appeals for the Tenth Circuit has "decided a federal question in a way in conflict with [the one] applicable decision of this court . . . "

At a minimum, if *Societe Internationale* is read as being confined to cases involving the types of extraordinary facts there present, the dilemma in which Andersen has been placed by the lower court's orders here demonstrates that the Court of Appeals has " decided an important question of federal law which has not been, but should be, decided by this court." (Rule 19(1)(b)).

3. The question presented by the improper application of the Federal Rules of Civil Procedure in this case

has such a potentially broad and pernicious effect as to require this Court's review and resolution. Andersen is but one of many American firms doing business abroad. Such firms are subject not only to the laws of the United States, but also to the laws of the other countries in which they do business, including Switzerland and other jurisdictions having one form or another of secrecy laws which can and do directly affect the ability of those firms to comply with orders of American courts that they make discovery of documents and information in such countries, which were generated or obtained in a confidential relationship.

If what has happened to Andersen here is not reviewed and corrected, the effect will be to place in jeopardy the foreign operations of American firms by the establishment of a rule of law that their own sovereign (the United States), acting through its judicial branch, can lawfully compel them to violate the criminal laws of foreign nations in which they do business.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 23, 1976

APPENDIX A

CAPTION OF THE COMPLAINT IN STATE OF OHIO V. CROFTERS, INC., ET AL., CIVIL ACTION NO. C-4628 (D. COLO.)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO,
Plaintiff,

vs.

CROFTERS, INCORPORATED,
a corporation
88 East Broad Street
Columbus, Ohio 43215

and

DEE GEE COMPANY,
a partnership
88 East Broad Street
Columbus, Ohio 43215

and

SIDNEY D. GRIFFITH
5055 Hayden Run
Amlin, Ohio 43002

and

HARRY A. GROBAN*
296 South Merkle Road
Columbus, Ohio 43209

and

GERALD A. DONAHUE
55 North Drexel Avenue
Columbus, Ohio 43209

Civil Action No.
72-138

and

KING RESOURCES COMPANY,
a corporation
Security Life Building
Denver, Colorado 80202

and

JOHN M. KING
26 Sunset Drive
Englewood, Colorado 80110

and

WILLIAM V. COFFEY*
3236 Cherry Ridge Road
Englewood, Colorado 80110

and

THE COLORADO CORPORATION,
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Denver, Colorado 80202

and

REGENCY INCOME
CORPORATION
a corporation
750 Metropolitan Building
Denver, Colorado 80202

and

ROBERT B. CREW, JR.*
Apartment 803
90 Corona Street
Denver, Colorado 80218

and

ELLIOT KEENE WOLCOTT
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Del Mar, California 92014

Civil Action No.
72-138

and

ARTHUR ANDERSEN &
COMPANY
a partnership
69 West Washington Street
Chicago, Illinois 60602

and

DUN & BRADSTREET,
INCORPORATED
c/o William J. Workman
c/o C.T. Corporation System
Union Commerce Building
Cleveland, Ohio 44115

and

FINANCIAL DATA
RELATIONS, INC.
a corporation
9896-A Wilshire Boulevard
Beverly Hills, Calif. 90210

and

RONALD R. HOWARD
901 North Roxbury
Beverly Hills, Calif. 90210,
Defendants.

} Civil Action No. 72-138

*The defendants marked with an asterisk have been dismissed from the action.

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, DATED DECEMBER 1, 1976.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ARTHUR ANDERSEN & CO.,
Petitioner,

v.

HONORABLE SHERMAN G.
FINESILVER, etc., et al.,
Respondents.

} No. 76-1618

PETITION FOR WRIT OF
MANDAMUS
(D.C. No. C-4628)

STATE OF OHIO,
Plaintiff-Appellee,

v.

ARTHUR ANDERSEN & CO.,
Defendant-Appellant.

} Nos. 76-1632
76-1633
and
76-1710

APPEALS FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. C-4628)

Paul E. Goodspeed (Coghill Goodspeed & Roble, Wilson & McIlvaine; Of Counsel: H. Thomas Coghill, Charles W. Boand and George W. Thompson, on the brief) for Appellant-Petitioner.

Miles M. Gersh (Harry L. Hobson, Luke J. Danielson and Holland & Hart, on the brief) for Plaintiff-Appellee.

Before LEWIS, Chief Judge, BREITENSTEIN and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The consolidated cases, one a petition for writ of mandamus and three direct appeals, all relate to pre-trial discovery orders entered by the district court. Petitioner and appellant, Arthur Andersen & Co., objected to the production of certain documents on the ground that production would violate the non-disclosure laws of Switzerland. The district court overruled the objections. We dismiss the appeals and deny the writ of mandamus.

In the Spring of 1970, the State of Ohio loaned King Resources Company, KRC, $8,000,000. In August, 1971, an involuntary petition under Chapter X of the Bankruptcy Act was filed against KRC. In the bankruptcy proceedings which are still pending, KRC has acknowledged its debt to Ohio.

On April 17, 1972, Ohio brought this suit in the United States District Court for the Southern District of Ohio against Andersen and others. Jurisdiction is based on § 22(a) of the Securities Act of 1933 as amended, 15 U.S.C. § 77v(a), and on § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa. KRC is one of the defendants. The Judicial Panel on Multidistrict Litigation transferred the case to the District of Colorado for coordinated proceedings with other cases arising out of the affairs of KRC. In re King Resources Company Securities Litigation, J.P.M.L., 352 F.Supp. 975. So far as the instant case concerns KRC, it has been stayed by an order in the bankruptcy proceedings.

Andersen is a partnership with its principal office in Chicago, Illinois. Andersen is an international organization of accountants with offices throughout the world. Ohio claims that in its purchase of KRC securities, it relied on financial statements which were prepared by Andersen and which related to the financial condition of KRC. Ohio says that audits of KRC by Andersen fraudulently misrepresented the financial condition of KRC in violation of federal and state securities laws.

During the final stages of the pre-trial discovery process, Ohio requested Andersen to produce various documents which Andersen had in its possession at its Geneva, Switzerland office. After much sparring, the number of documents involved was reduced to 20. Andersen refuses to produce the documents because production would allegedly violate Swiss secrecy laws.

On May 27, 1976 the district court granted Ohio's motion for discovery. Notice of appeal from this order was filed and is our number 76-1632. The May 27 order was modified on July 2 and a notice of appeal from that order was filed on July 9, our number 76-1633. On July 13, Andersen filed a petition for mandamus relief from the two mentioned orders. It is our number 76-1618. On July 23 we granted a temporary stay of the orders. On the same day the district court again modified the discovery order and required the production of the documents here in question. Notice of appeal was filed August 4. It is our number 76-1710. We permitted the filing of the mandamus

petition, required a response and consolidated that case with the three direct appeals. The stay was continued until the disposition of the four cases.

At the outset we are met with procedural problems. The orders covered by Nos. 76-1633 and 76-1710 were entered after notice of appeal had been filed to review the May 27 order. One query is the validity of the last two orders.

An unpublished opinion in No. 75-1297, Burnworth v. Salefish Incorporated, says that the filing of a notice of appeal deprives the district court of subject matter jurisdiction. See also 9 Moore's Federal Practice ¶203.11, pp. 735-740. In Euziere v. United States, 10 Cir., 266 F.2d 88, 91, vacated on other grounds, 364 U.S. 282, we said that the mentioned principle "presupposes that there is a valid appeal from an appealable order."

The Circuits disagree on whether the filing of a notice of appeal automatically divests a district court of jurisdiction. Some cases hold that there is no retained jurisdiction. See e.g. First National Bank of Salem, Ohio v. Hirsch, 6 Cir., 535 F.2d 343, 345 n. 1; United States v. Lafko, 3 Cir., 520 F.2d 622, 627; and Williams v. Bernhardt Bros. Tugboat Service, Inc., 7 Cir., 357 F.2d 883, 884-885. See also Hovey v. McDonald, 109 U.S. 150, 157.

Other courts have held that a district court has some retained jurisdiction after a notice of appeal has been filed. Hodgson v. Mahoney, 1 Cir., 460 F.2d 326, 328, cert. denied 409 U.S. 1039, says that when a notice of appeal is "manifestly deficient" by reason of a non-appealable order or otherwise, the district court may disregard it and proceed with the case "[o]therwise a litigant could temporarily deprive a court of jurisdiction at any and every critical juncture." In Ruby v. Secretary of United States Navy, 9 Cir., 365 F.2d 385, cert. denied 386 U.S. 1011, the Ninth Circuit considered the problem in an en banc session. It

held, Ibid. at 389, that if the notice of appeal is clearly invalid, the district court may ignore it. We are in essential agreement with the Ninth Circuit. If the notice of appeal is deficient by reason of untimeliness, lack of essential recitals, reference to a non-appealable order, or otherwise, the district court may ignore it and proceed with the case. If the district court is in doubt whether the notice of appeal is valid, it may decline to act further until disposition of the appeal. If the district court proceeds with the case under the mistaken belief that the notice of appeal is inoperative, the complaining party may seek relief from the court of appeals under 28 U.S.C. § 1651 and Rule 21, F.R.A.P.

In the instant case the trial court proceeded with the case. The objecting party petitioned the court of appeals for mandamus relief. The first question is the validity and effect of the notice of appeal attacking the May 27 order. Appellate jurisdiction is claimed under 28 U.S.C. § 1291 which gives the courts of appeals jurisdiction to review final decisions of district courts. We are concerned with an interlocutory order relating to discovery.

In Cohen v. Beneficial Loan Corp., 337 U.S. 541, the district court refused to apply a state statute which required plaintiff, in certain circumstances, to post security to indemnify defendant for expenses and attorneys' fees if plaintiff failed to make his complaint good. The Supreme Court said that the order was appealable under § 1291 "because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." Ibid. at 546-547.

We have held that an order for the production of documents is not normally appealable under the Cohen "collateral order" doctrine. Paramount Film Distributing Corp. v. Civic Center Theatre, 10 Cir., 333 F.2d 358, 361-362. In Covey Oil Company v. Continental Oil Company, 10 Cir., 340 F.2d 993, 995-997, cert. denied 380 U.S. 994,

we recognized an exception to this general rule where the order is collateral, fairly separable from the main litigation, and relates to a non-party who shows irreparable injury. See Natta v. Hogan, 10 Cir., 392 F.2d 686, 689.

In Societe Internationale v. Rogers, 357 U.S. 197, the Court held that a district court could not impose the sanction of dismissal against a plaintiff because the plaintiff had failed to produce foreign records on the ground that production would subject it to criminal prosecution in a foreign country. The Court said, Ibid. at 208:

> "Whatever its reason, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of non-compliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply."

Societe implies that consideration of foreign law problems in a discovery context is required in dealing with sanctions to be imposed for disobedience and not in deciding whether the discovery order should issue. The dilemma is the accommodation of the principles of the law of the forum with concepts of due process and international comity.

Certain Second Circuit cases arising after Societe suggest that a district court should not order production if the order would cause a party to violate foreign law. See First National City Bank of New York v. Internal Revenue Service, 2 Cir., 271 F.2d 616, 619; Ings v. Ferguson, 2 Cir., 282 F.2d 149, 152; and Application of Chase Manhattan Bank, 2 Cir., 297 F.2d 611, 613. Compare United States v. First National City Bank, 2 Cir., 396 F.2d 897, 900-901. The failure of these cases to recognize the distinction between power to compel discovery and imposition of sanctions for noncompliance has been criticized. See e.g. Note, Discovery of Documents Located Abroad in U.S. Antitrust

Litigation, 14 Va. J. Int. L., 747, 753. The importance of this distinction has been recognized. See Wright, Discovery, 35 F.R.D. 39, 81; and Restatement, 2d, Foreign Relations Law of the United States, § 39.(1), p. 111. See also Calcutta E. Coast of India & E. Pakistan/U.S.A. Conf. v. Federal Martitime [*sic*] Commission, D.C. Cir., 399 F.2d 994, 998-999, and American Industrial Contracting, Inc. v. Johns-Manville Corp., W.D.Pa., 326 F.Supp. 879, 880-881.

The procedural problems must be considered in the light of the mentioned background. Section 1291 requires a final decision. We have an important and extraordinary situation which, although not pertaining to the merits and not subjecting Andersen to actual harm, has the potential of causing harm if Andersen chooses not to comply. Societe does not say that a discovery order mandating violation of foreign law is invalid. It only indicates that the foreign law question goes to the imposition of a sanction for noncompliance with foreign law.

We are not impressed by Andersen's contention that international comity prevents a domestic court from ordering action which violates foreign law. See Restatement, 2d, Foreign Relations Law of the United States, § 39.(1). If the problem involves a breach of friendly relations between two nations, Andersen should call the matter to the attention of those officers and agencies of the United States charged with the conduct of foreign affairs, and they could make such representation to the court as they deemed suitable. Andersen has not taken this action. Instead, it purports to speak for the United States.

An anomalous situation with great potential effect would result from recognition of the right of a litigant to avoid discovery permitted by local law through the assertion of violation of foreign law. Foreign law may not control local law. It cannot invalidate an order which local law authorizes.

The Supreme Court has spoken out against piecemeal reviews. Kerr v. United States District Court, 48 L.Ed.2d 725; see also DiBella v. United States, 369 U.S. 121, 126. The district court had the power to enter the discovery orders. Andersen has the right of a direct appeal from any final judgment on the merits. The essence of Andersen's objections is that the discovery orders subject it to irreparable harm. As said in Ryan v. Commissioner of Internal Revenue, 7 Cir., 517 F.2d 13, 19:

> "*Every* interlocutory order involves, to some degree, a potential loss or harm. That risk, however, must be balanced against the need for efficient federal judicial administration, the need for the appellate courts to be free from the harassment of fragmentary and piecemeal review of cases otherwise resulting from a succession of appeals from the various rulings which might arise during the course of litigation."

Although we recognized in Paramount Film Distributing Corp., 10 Cir., 333 F.2d 358, 362, that the Cohen "collateral order" doctrine may be applied in discovery proceedings "upon a proper showing", no proper showing has been made here. When and if a subsequent order of the court imposes a harmful sanction, that order may then be reviewed. The discovery orders are not final decisions and not appealable under § 1291.

The mandamus petition, No. 76-1618, raises the serious and important question of whether the entry of the discovery orders by the district court was an usurpation of power. Kerr v. United States District Court, 48 L.Ed.2d 725, says that mandamus is proper when a party has no other adequate means to obtain relief and his right to relief is clear and indisputable. Our denial of the appealability of the orders under § 1291 leaves Andersen's sole remedy that of application for an extraordinary writ under 28 U.S.C. § 1651. See also Rule 21, F.R.A.P. In the circumstances, mandamus is a proper method of raising the question of usurpation of power. We have considered the question and, for the reasons stated above, conclude that the district court did not usurp any power.

In Nos. 76-1632, 76-1633, and 76-1710, the appeals are dismissed for lack of a final, appealable order. In No. 76-1618, the petition for mandamus relief is denied.

APPENDIX C

STATUTES INVOLVED

STATUTES OF THE UNITED STATES

28 U.S.C. § 1291 Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1975, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348.

28 U.S.C. § 1651 Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. As amended May 24, 1949, c. 139, § 90, 63 Stat. 102.

PENAL CODE OF SWITZERLAND

Article 162

French:

Celui qu aura révélé un secret de fabrication ou un secret commercial qu'il était tenu de garder en vertu d'une obligation légale ou contractuelle,

celui qui aura mis à profit cette révélation,

sera, sur plainte, puni de l'emprisonnement ou de l'amende.

English:

Anyone who discloses manufacturing or business secrets which he was required to respect by virtue of a legal or contractual obligation, and anyone who profits from such disclosure, shall upon complaint be punishable by imprisonment or fine.

Article 273

French:

Celui qui aura cherché à découvrir un secret de fabrication ou d'affaires pour le rendre accessible à un organisme officiel ou privé étranger ou à une entreprise privée étrangère, ou à leurs agents,

celui qui aura rendu accessible un secret de fabrication ou d'affaires à un organisme officiel ou privé étranger, ou à une entreprise privée étrangère, ou à leurs agents,

sera puni de l'emprisonnement ou, dans les cas graves, de la réclusion. Le juge pourra en outre prononcer l'amende.

English:

Any person who attempts to discover a manufacturing or business secret in order to make it available to an official or private foreign organization, or to a private foreign enterprise, or to their agents,

Or any person who makes available a manufacturing or business secret to an official or private foreign organization, or to a private foreign enterprise or to their agents,

Shall be liable to imprisonment or, for serious offences, to solitary confinement. The court may in addition impose a fine.

Article 35

French:

La réclusion est la plus grave des peines privatives de liberté. Sa durée est d'un an au moins et de vingt ans au plus. Lorsque la loi le prévoit expressément, la réclusion est à vie.

English:

Solitary confinement is the most serious of the penalties depriving a person of liberty. Duration is for not less than one year nor more than twenty years. If expressly provided for by law, solitary confinement is for life.

Article 36

French:

La durée de l'emprisonnement est de trois jours au moins et, sauf disposition expresse et contraire de la loi, de trois ans au plus.

English:

The length of time of imprisonment is of not less than three days and in the absence of express contrary provision of the law, not more than three years.

Article 48

French:

1. Sauf disposition contraire de la loi, le maximum de l'amende sera de 40,000 francs.

Si le délinquant a agi par cupidité, le juge ne sera pas lié par ce maximum.

2. Le juge fixera le montant de l'amende d'après la situation du condamné, de façon que la perte à subir par ce dernier constitute une peine correspondant à sa culpabilité.

Pour apprécier la situation du condamné, le juge tiendra compte notamment des éléments ci-après: revenu et capital, état civil et charges de famille, profession et gain professionel, âge et état de santé.

3. L'amende est éteinte par la mort du condamné.

English:

1. In the absence of a contrary provision of law, the maximum fine shall be Swiss francs 40,000. If the condemned has acted through cupidity, the judge shall not be bound by this maximum.

2. The judge shall fix the amount of the fine in accordance with the situation of the condemned man, in such a manner that the loss undergone by the latter shall constitute a penalty corresponding to his guilt.

In order to appreciate the condemned man's situation, the judge shall take into account in particular the following elements: income and capital, civil status and family charges, profession and professional income, age and state of health.

3. The fine is extinguished by the death of the condemned man.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 34:

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data

compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

As amended Dec. 27, 1946, eff. March 19, 1948; March 30, 1970, eff. July 1, 1970.

Rule 37:

FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b) (6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reason-

able expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees,

caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Subpoena of Person in Foreign Country. A subpoena may be issued as provided in Title 28 U.S.C. § 1783, under the circumstances and conditions therein stated.

(f) Expenses Against United States. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

As amended Dec. 29, 1948, eff. Oct. 20, 1949; March 30, 1970, eff. July 1, 1970.

APPENDIX D

EXCERPTS FROM THE DOCKET SHEET OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO REFLECTING ORDER OF MAY 27, 1976.

STATE OF OHIO)
vs) C-4628—Pages 12, 13
CROFTERS, INC., ET AL)

PROCEEDINGS

DATE
1976

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* * *

5/26

* * *

ORDERS RE DISCOVERY MOTIONS:

* * *

3) Motion for discovery of certain documents of Andersen & Co. in Geneva Office is granted; Court will not impose sanctions.

* * *

eod 5/27

APPENDIX E

OPINION OF SWISS COUNSEL

Lenz, Schluep, Briner & De Coulon
Avocats au Barreau de Genève
25, Grand'Rue • 1211 Genève 11

LEGAL OPINION

Having been requested by Arthur Andersen & Co. with respect to several questions relating to the laws of Switzerland regarding the disclosure by auditors and accountants of documents and other information in their possession in Switzerland.

The undersigned member of the above firm hereby certifies and declares as follows:

1. That he is a duly licensed advocate (attorney) practising in Switzerland b fore the courts of the Canton of Geneva;
2. That he is versed in the laws of Switzerland, including its treaties, statutes and the decisions of its courts;
3. That the statutes herein set forth are true, complete and correct copies in the French language or English translations of the official statutes of Switzerland referred to herein and that said statutes have not been repealed, amended or otherwise modified;
4. That this opinion accurately and correctly sets forth his opinion of Swiss law on the subject matter as presently in effect.

I. FACTS

We understand that the reasons for which our opinion is requested is based upon the following facts:

The Swiss branch office of Arthur Andersen & Co., during a period commencing prior to 1968 and continuing through a portion of 1971, performed various auditing work on behalf of Fund of Funds Limited and its subsidiary ("F.O.F."), and on behalf

of Investors Overseas Service Ltd. and its subsidiaries and affiliated companies ("I.O.S."), which consisted in part of auditing Swiss companies as auditors appointed under the relevant provisions of the Swiss Code of Obligations, in part of auditing Swiss offices of foreign companies operating in Switzerland, and in part of auditing foreign companies for which records were kept in Switzerland. Auditing work regarding a Swiss bank was also done at the request of I.O.S. by an affiliate of Arthur Andersen & Co. organized under the laws of Switzerland, which was not the statutory auditor of that bank under the Swiss banking law.

Arthur Andersen & Co. is a defendant in a civil lawsuit pending in the United States district court for the district of Colorado entitled State of Ohio v. Crofters, Inc., et al. The lawsuit is an action by the State of Ohio under United States securities laws and State statutory and common law, in which the State of Ohio seeks money damages from Arthur Andersen & Co. and others in respect of certain loans made by the State to King Resources Company which were not repaid when due. During the course of pretrial proceedings in that action, the State of Ohio (the adversary of Arthur Andersen & Co.) has requested that Arthur Andersen & Co. voluntarily produce for inspection by the State of Ohio many types of documents relating to the auditing work performed by Arthur Andersen & Co. for F.O.F. and I.O.S. and obtained by Arthur Andersen & Co. in its confidential relationship with F.O.F. and I.O.S. as auditors, which documents may be located at the offices of Arthur Andersen & Co. in Switzerland—for example:

> "Any and all documents used in examining the financial condition of I.O.S. or its subsidiaries or affiliates, or relating to such financial condition, specifically including but not limited to

> documents reflecting sales and redemptions of fund shares, quotations of value of fund shares, results or operations, cash flow forecasts, studies of source and application of funds, liquidity, available lines of credit, cash balances, or other documents reflecting the current liquidity of such companies during the period from January 1, 1968 to May 1, 1971."

The State of Ohio has also propounded to Arthur Andersen & Co. written questions and has requested that the answers to such questions include any information which may be available in the offices of Arthur Andersen & Co. in Switzerland.

Arthur Andersen & Co. has declined to produce voluntarily any documents located in Switzerland, and has similarly declined to answer any questions on the basis of information which may be available in Switzerland, on the ground that to do either might subject it and its Swiss affiliate or the partners and employees of either, to sanctions under applicable Swiss laws.

The State of Ohio is now seeking an order of the United States district court directing Arthur Andersen & Co. to produce documents which may be located in the offices of Arthur Andersen & Co. and its Swiss affiliate in Switzerland, and to answer written questions on the basis of any responsive information which may be available in the offices of Arthur Andersen & Co. and its Swiss affiliate in Switzerland.

II. PROVISIONS APPLICABLE

The following various legal provisions upon which this opinion is based are, in the belief of the undersigned, true, complete and correct English translations of the exhibits attached hereto and listed as follows:

Exhibit A—Swiss Code of Obligations
(Commercial Law) Article 730

Exhibit B—Swiss Penal Code, Article 162
Exhibit C—Swiss Penal Code, Article 273
Exhibit D—Swiss Penal Code, Article 321
Exhibit E—Swiss Penal Code, Article 3
Exhibit F—Swiss Penal Code, Article 4
Exhibit G—Swiss Penal Code, Article 5
Exhibit H—Swiss Penal Code, Article 7
Exhibit I—Swiss Federal Banking Law, Article 47

Exhibit A—Swiss Code of Obligations, Article 730

Duty to maintain secrecy

"Auditors of a corporation are prohibited from communicating to individual shareholders or to third parties any information obtained in the carrying out of their duties."

Exhibit B—Swiss Penal Code, Article 162

Breach of manufacturing or business secrets

"Anyone who discloses manufacturing or business secrets which he was required to respect by virtue of a legal or contractual obligation, and anyone who profits from such disclosure, shall upon complaint be punishable by imprisonment or fine."

Exhibit C—Swiss Penal Code, Article 273

Disclosure of economic information

"Any person who attempts to discover a manufacturing or business secret in order to make it available to an official or private foreign organization, or to a private foreign enterprise, or to their agents,

Or any person who makes available a manufacturing or business secret to an official or

private foreign organization, or to a private foreign enterprise or to their agents,

Shall be liable to imprisonment or, for serious offences, to solitary confinement. The court may in addition impose a fine."

Exhibit D—Swiss Penal Code, Article 321

Breach of professional secrecy

"(Cipher 1) Priests, lawyers, advocates, notaries, auditors subject to professional secrecy by virtue of the Swiss Code of obligations, doctors, dentists, pharmacists, midwives, as well as their assistants, who disclose a secret entrusted to them by virtue of their profession or who have gained knowledge of such secret in the exercise of such profession, shall, upon complaint, be punishable by imprisonment or fine.

Students who disclose a secret which they have learned during the course of their studies shall also be subject to the same penalty.

Such disclosure shall be punishable even though the person to whom the secret is entrusted no longer exercises his profession or has finished his studies.

(Cipher 2) Disclosure shall not be punishable if it was made with the consent of the interested party or if, upon the application of the person having knowledge of the secret, the governing authority or the supervisory authority has so authorized him in writing.

(Cipher 3) The provisions of the Federal and Cantonal legislations concerning the duty to inform the authorities or to give

evidence in court proceedings shall remain applicable."

Exhibit E—Swiss Penal Code, Article 3

Territorial application

"(Cipher 1) This code is applicable to any person who commits a felony or misdemeanor in Switzerland.

If the offender has served a sentence for his act, either fully or partially, in another country, the Swiss court shall credit him with the portion so served.

(Cipher 2) An alien who has been prosecuted in a foreign country at the request of the Swiss authorities shall not be punished for the same offence in Switzerland:

If the foreign court has acquitted him, or if the penalty to which he had been sentenced in the foreign country has been served, suspended or has come within the statute of limitations.

If the offender has not served or only partially served it, the whole sentence or the remainder shall be served in Switzerland."

Exhibit F—Swiss Penal Code, Article 4

Felonies or misdemeanors committed abroad against the State

"This code is applicable to any person who, while abroad, commits a felony or misdemeanor against the State (Article 265, 266, 266bis, 267, 268, 270, 271, 275, 275bis, 275ter) or is guilty of espionage (Articles 272 to 274) or harms military security (Articles 276 and 277).

If as a result of such information [*sic;* should be infraction] such person has served a sentence, either totally or partially, abroad, the Swiss Court shall credit him with the sentence served."

Exhibit G—Swiss Penal Code, Article 5

Felonies or misdemeanors committed abroad against Swiss national

"This code is applicable to any person who commits a felony or misdemeanor abroad against a Swiss national, provided the act is also punishable in the place where it is done, and further provided that the person who has done such act is in Switzerland and has not been extradited abroad, or has been extradited to the Confederation because of the infraction. The foreign law will, however, be applicable if it is more favorable to the accused.

The person who has done such act can no longer be punished therefore if he has served the sentence pronounced against him abroad, if he has been released from completing such sentence, or if punishment abroad is barred by the statute of limitations.

If he has not served the sentence pronounced against him abroad, the sentence shall be served in Switzerland; if he has served but a part of such sentence, the remainder shall be served in Switzerland."

Exhibit H—Swiss Penal Code, Article 7

Place of commission of the felony or misdemeanor

"A felony or misdemeanor is deemed to have been committed at the place where the of-

fender committed it and where the effect has occurred.

An attempt is deemed to have been committed at the place where the offender attempted it and where the effect was designed to occur."

Exhibit I—Swiss Federal Banking Law of 1934, Article 47

Disclosure of banking secrets

"(Cipher 1) Anyone who, in his capacity as an officer, director, employee, authorized agent, liquidator or commissioner of a bank, or as a representative of the Banking Commission or as an officer, director or employee of a licensed auditing firm discloses a secret entrusted to him or which he has become aware of by reason of his duties,

or anyone who induces or attempts to induce a person to violate his professional duty of secrecy, shall be liable to imprisonment for up to six months or to a fine up to Sw.Fr. 50'000.—, or both.

(Cipher 2) If the offender acted with negligence, he shall be liable to a fine of up to Sw.Fr. 30'000.—.

(Cipher 3) The breach of a secret shall be punishable even though the contractual or employment relationship has been terminated or the person to whom the secret is entrusted no longer exercises his profession.

(Cipher 4) The provisions of the Federal and Cantonal legislations concerning the

duty to inform the authorities or to give evidence in court proceedings shall remain applicable."

III. COMMENTS ON ABOVE QUOTED PROVISIONS

1. Breach of professional secrecy: Swiss Code of Obligations, Article 730 and Swiss Penal Code, Article 321

Swiss law only provides a *client-auditor privilege* for the relationship with the statutory auditors which a Swiss company is required to have as per the provisions of the commercial law (Swiss Code of Obligations: Articles 727 seq. in particular Article 730 quoted above (Exhibit A). The penal sanction for the prohibition contained in Article 730 of the Swiss Code of Obligations against statutory auditors communicating information obtained in the carrying out of their duties is found in Article 321 of the Swiss Code quoted above (Exhibit D).

If other relations between a company (Swiss or foreign) and auditors or accountants are concerned, the parties are free to establish *contractual obligations to keep secrecy,* but violation of such secrecy does not fall under Article 321 of the Swiss Penal Code (Swiss Federal Supreme Court Decision 83 IV 197).

A violation of such contractual obligation to maintain secrecy could, however, fall under the Articles 162 and 273 of the Swiss Penal Code quoted above (Exhibit B and C).

The client-auditor privilege is for the protection and benefit of the client. The client is free to waive his privilege (Article 321 cipher 2 of the Swiss Penal Code). However, even a waiver by

the client could not indemnify the auditor if he discloses business secrets in contravention of Article 162 and/or 273 of the Swiss Penal Code (violation of third party and state interests).

It should be noted in connection with Article 321 cipher 2 that there is no governing authority or supervisory authority over auditors which may authorize them to testify and disclose.

Furthermore, the reserve of cipher 3 of Article 321 of the Swiss Penal Code is subject to any provisions to the contrary of the Federal and Cantonal States.

The competence for personal prosecution in Switzerland is divided among Cantonal and Federal authorities. For violations of Articles 162 and 321 of the Swiss Penal Code, Cantonal procedure law would apply and for violations of Article 273, Federal procedure law. As to the *testimonial privilege of accountants or auditors* in civil or in criminal proceedings, limitations depend on procedural laws which are Federal and Cantonal (which differ from Canton to Canton). We will restrain ourselves to study the procedure of the Cantons of Geneva and of Zurich where, according to our information, the branch office and the affiliate company of Arthur Andersen & Co. are located.

In civil proceedings, Article 42 of the Federal Law on Civil Procedure of December 4th, 1947 confers upon the persons subject to Article 321 of the Swiss Penal Code, i.e. the statutory auditors of Swiss companies, the right to refuse to give evidence if they are questioned on facts which, according to that provision, come within the field

of professional secrecy, insofar as the interested party has not consented to the disclosure of the secret; the cipher 2 of this Article 42 says that the Judge may relieve the witness (i.e. an accountant even if not acting as a statutory auditor) from the obligation to reveal other professional secrets and business secrets if, despite the precautionary measures of Article 38 ("If protection of business secrets of one party or a third party so demands, the Judge may give evidence in the absence of the adverse party or both parties."), the interests of the witness in guarding the secret is greater to him than the interest of any third party that it should be revealed.

According to Article 227 of the law of Civil Procedure of the Canton of Geneva dated October 13th 1920, persons having knowledge of secrets as a result of their status or profession are not obliged to give evidence. However these persons are bound to give evidence on facts evidenced by deeds to which they were party or to which they have participated as public notaries or instrumental witnesses, in the event that the truth of these facts is contested. Therefore auditors and accountants are not obliged to testify unless they were party to facts which were evidenced by deeds and which are contested.

In the Canton of Zurich, the right to refuse to give evidence is granted to clergymen, physicians, attorneys and notaries without any limitation and to members of other professions (i.e. auditors and accountants) only if the duty to maintain secrecy overrides the duty of disclosure and in this case it is for the court to resolve the conflict between the two duties (Article 188 of the Civil Procedural Law in the Canton of Zurich—Kurt

Mueller: The Swiss Banking Secret from a Legal View, Vol. 18 of the International and Comparative Law Quarterly, p. 367).

In penal proceedings the various penal procedure codes provide for different solutions. Some do not grant any testimonial privilege to accountants or auditors (e.g. Federal Penal Procedure Code, Article 74 seq.; Penal Procedure Code of the Canton of Zurich, Article 128 seq.) while others recognize a testimonial privilege of the statutory auditors of Swiss companies based on the auditor-client privilege stated by Article 730 of the Swiss Code of Obligations (e.g. Penal Procedure Code of the Canton of Geneva, Article 292). As far as we know, there is no testimonial privilege in a penal proceeding for accountants not acting as statutory auditor of Swiss companies in any of the Cantons.

While the reserve of cipher 3 of Article 321 of the Swiss Penal Code also applies to testimony before Swiss courts in case of proceedings under letters rogatory, it may in no way be extended to foreign authorities.

The consequences of an auditor disclosing information without obtaining the client's consent are criminal penalties, imprisonment or fine (inter alia under Article 321 of the Swiss Penal Code), and civil liability.

2. **Breach of manufacturing or business secrecy:**
Article 162 of the Swiss Penal Code

Pursuant to Article 162 section 1 of the Penal Code, any person who discloses a manufacturing or business secret which he was required to keep secret by virtue of a legal or contractual obligation, commits a criminal offence.

The information disclosed *must be a manufacturing or business secret*. This means that the facts disclosed must relate to manufacturing or commercial transactions which are neither public knowledge nor accessible to the public, which the owner of the secret has a legitimate interest in keeping secret and which he genuinely wishes to keep secret (Federal Supreme Court Decisions 64 II 170, 84 IV 27; Vital Schwander, Das schweizerische Strafgesetzbuch, 2nd ed. 1963, p. 399). In order to constitute a business secret the facts should only be known to a closed circle of persons who are under a duty to keep those facts secret or who have a strong interest themselves in keeping the facts secret (Schwander, op. cit. p. 396; Federal Supreme Court Decision 64 II 171).

The offender must be under a contractual or legal duty to keep secrecy. A *legal duty* exists e.g. for government officials, lawyers, medical doctors, statutory auditors to Swiss corporations but not for auditors under mere contractual obligations.

The existence of a *contractual obligation* has to be established in each individual case. Usually officers and employees of a business enterprise are under such contractual duty. The same will be true for auditors regardless of whether they perform statutory or just contractual auditing. If an enterprise has its business audited, it can, in the absence of an express agreement on this subject, be said that it impliedly agreed to such disclosures as are required for proper auditing purposes according to generally accepted auditing standards.

According to Article 7 of the Penal Code (Exhibit H), a crime is deemed to have been committed in the place where the act has been done as well as

in the place where such act causes an effect. This means that a violation of Article 162 can be committed abroad if the secret disclosed belongs to a resident of Switzerland.

It should be noted that prosecution for violation of Article 162 may only be *undertaken upon complaint* of the party whose information has been disclosed, provided such party has not previously consented to the disclosure. This complaint may only be filed within three months after the party concerned has become aware of the identity of the person having violated his rights (Article 29 of the Penal Code). Prosecution and court procedure are barred if the holder of the secret withdraws his complaint before the court has reached its final decision.

Article 273 section 2 and Article 162 section 1 of the Penal Code overlap and it is generally considered that Article 273 overrides Article 162 (Schwander, op. cit. p. 481; Paul Logoz, *Commentaire du Code Pénal Suisse* I 205). This means that a person may be indicted under both articles for the same disclosure but that he can only be convicted under Article 273 if all requirements of this provision are met.

3. **Disclosure of economic information**

Article 273 of the Penal Code

Article 162 of the Swiss Penal Code is aimed at protecting private interests. Article 273 of the same Code aims to protect the public Swiss interests in keeping confidential files.

Pursuant to Article 273 section 2 of the Penal Code, it is a criminal offence to make available a manufacturing or business secret to an official

or private foreign organization, to a private foreign enterprise or to their agents.

The purpose of this provision is to protect the national sovereignty of Switzerland and more specifically the Swiss economy.

Disclosure of economic information which is considered as jeopardizing Swiss economic interests as a whole is followed by criminal prosecution "ex officio" i.e. without any private complaint being necessary. Disclosure of economic information in these cases is treated as a crime against the State and its sovereignty (Swiss Federal Court Decisions: 71 IV 218, 74 IV 104, 74 IV 211, 85 IV 139, 95 I 449, 98 IV 209 inter alia).

Swiss economic interest requires that enterprises or individuals forming part of the Swiss economy may keep their manufacturing and business secrets. The term *"business secret"* as used in Article 273 section 2 covers all facts of economic life for which a legitimate interest exists that they be kept secret or in the court's original German language "alle Tatsachen des Wirtschaftslebens, an deren Geheimhaltung ein schutzwürdiges Interesse besteht" (Swiss Federal Supreme Court Decision 74 IV 103, 74 IV 211, 98 IV 210 inter alia).

A review of cases as well as textwriter comments published in Switzerland show conclusively that case law has expressly developed the concept that the crime under Article 273 of the Penal Code does not require that in any particular instance, the interests of the State as such have been endangered or jeopardized (Swiss Supreme Court Decision 74 IV 206 seq.): An offence under Article 273 is committed not only when the person endeavours to discover economic information of a secret nature

in order to make it available to interested parties abroad, whether public or private, but also when a person discloses secrets which come to his knowledge even lawfully, by making such secrets available to interested parties abroad, whether public or private.

The persons who are considered as having a legitimate interest are defined very broadly in the Supreme Court's interpretation of Article 273 of the Penal Code. In fact, the Supreme Court has pointed out that not only the persons directly concerned with the secret but also third parties, such as clients of a bank, clients of a lawyer, employees or trade partners have a legitimate interest in certain facts not being disclosed (Swiss Federal Supreme Court Decision 65 I 330 seq.).

The interests of foreign residents may also be legitimate and therefore be protected by Article 273 of the Penal Code. In an unpublished decision of 1949 the Swiss Federal Supreme Court ruled that a person with foreign nationality and residence having a bank account in Switzerland was protected by Article 273.

In order to be considered a business secret, a fact of economic life must not be generally known but knowledge of it must remain restricted to a certain closed number of persons. In analogy to the interpretation given to Article 162 of the Swiss Penal Code, it must be assumed that a secret which has been disclosed to particular third parties or which by any other means is known to such particular third parties, is not yet considered as generally known. This is particularly true in cases where the third party is under an obligation to keep secrecy (V. Schwander, op. cit. p. 396; Federal Supreme Court Decision 64 II 171).

It is generally recognized that anybody may disclose facts to foreign addressees that only concern himself and in the secrecy of which he is the only party interested. Information concerning more than one party may be disclosed upon agreement of all parties interested unless such disclosure is contrary to the public interest of the Swiss State and its economy.

In order to fall within Article 273 disclosure must be to a foreign official or private organization, to a foreign private enterprise or their agents. The disclosure to a private foreign enterprise was not included in the original version of this article enacted in 1935 as part of a Federal Act to guarantee the security of Switzerland but was only inserted when this provision later became part of the Swiss Penal Code which was adopted in 1937. It is generally considered to be a very far reaching extension of the scope of Article 273. Its interpretation was at issue in a 1948 Federal Supreme Court case:

A former employee of a Swiss private enterprise had disclosed a manufacturing secret of this enterprise to a Belgian enterprise. The Cantonal Supreme Court of the Canton of Neuchâtel had decided that this disclosure would only fall under Article 162 (see below) and not under Article 273 because violation of Article 273 would not only require disclosure to a foreign beneficiary but also that the nature of the secret be such that its disclosure would endanger the Swiss State or its national defense. The Supreme Court reversed this decision on the grounds that the text of the Code was clear and that there was no room for a restrictive interpretation of Article 273. Every dis-

closure of a manufacturing or business secret to a foreign private enterprise would fall under Article 273 section 2 of the Penal Code (Federal Supreme Court Decision 74 IV 206 seq.).

A leading textwriter takes a contrary view and advocates a restrictive interpretation of the clause concerning the disclosure of information to a private foreign enterprise. He thinks that this specific clause can only be justified if there is a danger that the foreign enterprise may make available the information which it has obtained to foreign state officials and that thereafter the foreign state may undertake action against Switzerland or private enterprises or individuals in Switzerland (Schwander, op.cit. p. 481).

The question as to how to apply the provisions of Article 273 of the Penal Code concerning the disclosure of information to foreign private enterprises is indeed rather complex, particularly with regard to the flow of information between a private foreign enterprise and its Swiss branch or its wholly owned Swiss subsidiary. It cannot be denied that certain information has to be exchanged across the Swiss border and this information often is kept secret within the international corporation or group and thus constitutes a business secret. However, generally no problem arises as the Swiss parties interested in the secret in such situations agree to the intra-corporation or intra-group disclosure of information and consequently Article 273 does not apply, provided neither third party interests nor the direct interest of the Swiss State is endangered (compare above).

Where third party interests are involved, the plain wording of Article 273 would include the intra-

company or intra-group disclosure of information and information may therefore not be disclosed to addressees abroad.

In order to constitute a violation of Article 273 section 2 of the Penal Code the person who discloses information must know that the information is a manufacturing or business secret and that he is disclosing the information to a foreign addressee as specified in Article 273 of the Penal Code.

Out of the three Articles of the Swiss Penal Code above, Article 273 concerning disclosure of economic information to foreign addressees and Article 321 concerning breach of professional secrecy are more important and more specific than Article 162 which is aimed only at protecting private interests. Conviction for violation of the latter Article is therefore likely to occur in situations where the other two Articles do not apply.

4. Breach of banking secrecy

Article 47 of the Swiss Federal Banking Law

Pursuant to Article 47 of the Federal Banking Law of 1934 (Exhibit I) anyone who, in his capacity as auditor, or as director, officer or employee of the auditing firm of a bank, intentionally or negligently, violates his professional rule of secrecy, is guilty of a criminal offence. The fact whether or not the auditor serves as statutory auditor of a Swiss bank does not change anything with regard to the application of banking secrecy. The Federal Banking Law does not state in which cases there is a right or duty to give information. The professional duty to maintain banking secrecy is imposed by private law as opposed to penal law and arises out of the contractual relationship between the

bank and its customer. However Article 47 of Federal Banking Law creates a penal sanction in case of breach of this private law duty. Banking secrecy covers all items of a business or personal nature of which the bank acquires knowledge in connection with the business transactions of and consultations with its customers (Kurt Mueller, op. cit. p. 362). Directors, officers and employees of the auditing firm working for a Swiss bank have a professional duty to keep secret all facts and things, not matters of public knowledge, learned by them in the bank during the course of their duties.

It must be remembered that the Banking Law applies also to subsidiaries or branch offices of foreign banks established in Switzerland (Article 2 of the Federal Banking Law). Thus these banks are subject to the secrecy rule to the same extent as Swiss banks (Kurt Mueller, op.cit. p. 363 in fine).

Violation of banking secrecy under Article 47 of the Federal Banking Law by a director, officer or employee of an auditing firm is not the sole ground on which criminal liability may be incurred. The director, officer or employee of an auditing firm could also be indicted under Article 273 of the Penal Code for such disclosure if he reveals a manufacturing or business secret to an official or private foreign organization or to a private foreign enterprise or to their agents. The disclosure of a manufacturing or business secret, if it does not fall within the prohibition of Article 47 of the Swiss Federal Banking Law and/or Article 273 of the Swiss Penal Code, might still be punishable under Article 162 of the Swiss Penal Code if such disclosure is in breach of the contractual obligation between the auditing firm and the Swiss bank.

The Penal Code applies only to natural persons; corporate bodies or partnerships cannot be convicted of the felonies and misdemeanors stated in the Penal Code (Federal Supreme Court Decision 85 IV 89); only their directors, officers and employees can be so convicted.

According to Article 3 of the Swiss Penal Code any persons who commits a criminal offence in Switzerland is subject to the Swiss Penal Code.

By virtue of Articles 4 (Exhibit F), 5 (Exhibit G) and 7 (Exhibit H) of the Swiss Penal Code, Article 730 of the Swiss Code of Obligations, Article 47 of the Federal Banking Law, as well as Articles 162, 273 and 321 of the Swiss Penal Code have extraterritorial effect. A disclosure abroad by the director, officer or employee of a Swiss auditing or accounting firm is deemed to cause an effect in Switzerland by virtue of the fact that the information involves the activities of a Swiss company and therefore the person who discloses the business secret abroad may incur criminal liability in Switzerland under the above mentioned Articles.

IV. QUESTIONS AND ANSWERS

On the basis of the factual situation outlined in the beginning and under the relevant laws, decisions of the Swiss Federal Supreme Court, textwriter comments and legal considerations as stated above, the undersigned answers as follows to the following questions:

Question 1:

Is information obtained by accountants in the course of accounting and auditing work in Switzerland for a client prohibited by law from being disclosed to others?

Answer 1:

Regarding information obtained by accountants in the course of accounting and auditing work performed in Switzerland, Article 162 of the Swiss Penal Code would apply to any disclosure made in the absence of the client as well as, due to the particular situation of auditors, to any disclosure which might be of interest to third parties, i.e. namely clients and trade partners of the auditor's client.

Furthermore the providing of information under an order of a US court would make available business secrets to a foreign authority and, as such fall under section 2 of Article 273 of the Swiss Penal Code quoted above.

Besides, the disclosure of information obtained in the course of auditing Swiss companies as statutory auditors would constitute a breach of professional secrecy imposed upon auditors by Article 321 of the Penal Code in connection with Article 730 of the Code of Obligations. Finally, information obtained by auditors in the course of auditing work regarding a bank established in Switzerland has to be kept secret according to Article 47 of the Federal Banking Law.

The disclosure of information obtained in the course of accounting and auditing work in Switzerland is therefore prohibited by law in each particular case.

Question 2:

What criteria are applied to determine whether particular information is subject to the nondisclosure law?

Answer 2:

As stated under III. above, business secrets have been given a very broad construction by the Swiss

Federal Supreme Court and cover all facts of economic life which are not generally known and for which a legitimate interest exists that they be kept secret. Not only the interests of the parties directly concerned but also the interests of third parties, e.g. clients, employees or trade-partners, as well as the public interest of Switzerland itself and its economy are considered as legitimate.

Question 3:

Is there any difference in the application of the nondisclosure law in the case of documents or data obtained by the accountant in his confidential relationship as accountant, depending of the nature of source of the documents or data:

a) documents obtained from the client?

b) documents obtained from persons other than the client?

c) documents to which persons other than the client or the accountants are parties?

d) documents prepared by the accountants relating to the client or the conduct of the auditing or accounting work for the client?

e) non-documentary information concerning the affairs of the client or others?

f) documents or information obtained from or prepared outside of Switzerland but in the possession of the accountants in Switzerland?

Answer 3:

Article 273 section 2 of the Penal Code prohibiting the disclosure of business secrets does not distinguish how the documents are obtained, nor whether documentary or non-documentary information is concerned. The Swiss Federal Supreme

Court has also ruled that it does not matter whether the information disclosed is true or false (Swiss Federal Supreme Court Decision 74 IV 103) nor whether this information was obtained legally or illegally by the person charged with violation of Article 273 section 2 of the Penal Code (Swiss Federal Supreme Court Decision 85 IV 139).

The same rules would apply regarding Article 321 of the Penal Code concerning the professional secrecy.

The situation is somewhat different with regard to Article 162 of the Penal Code which only prohibits the disclosure of business secrets if a legal or contractual obligation to observe secrecy exists. Regarding accountants, a legal obligation to observe secrecy exists only for the statutory auditing of Swiss companies (Article 730 of the Code of Obligations) while the existence of a contractual obligation has to be checked in each individual case. By virtue of the subordination of Article 162 to Article 273 and 321 of the Penal Code it seems not necessary to go into further details regarding Article 162.

Based on Article 273 of the Penal Code, the answers to your question would therefore be:

a) No

b) No

c) No

d) No

e) No, it does not matter if the information is documentary or not;

f) It would not make any difference whether the information was obtained from abroad

or whether it was prepared outside Switzerland as long as the information was available in Switzerland.

Question 4:

What are the consequences of the disclosure of documents or information in violation of the law?

a) criminal penalties?

b) civil penalties?

c) forfeiture of licence to practice accounting?

Answer 4:

a) the possible *criminal penalties* are as follows:

—violation of *Article 273* section 2 of the Swiss Penal Code for which imprisonment or solitary confinement with a possible additional fine may be imposed;

—violation of *Article 162* of the Swiss Penal Code for which imprisonment or fine may be imposed;

—violation of *Article 321* of the Swiss Penal Code for which imprisonment or fine may be imposed;

—violation of *Article 47* of the Swiss Federal Banking Law for which imprisonment (but not exceeding 6 months) or fine (which may go up to Sw.Fr. 50'000.—) or both may be imposed.

Under the Swiss Penal Law:

—*Imprisonment* is of not less than 3 days nor more than 3 years (Article 36 of the Penal Code).

—*Solitary confinement* is not less than one year nor more than 20 years; if expressly

provided by law, may be a maximum of life (Article 35 of the Penal Code).

—*Fines* may go up to Sw. Fr. 40'000.—(Article 48 of the Penal Code).

b) Civil liabilities will be incurred towards all persons damaged by an illegal disclosure of information pursuant to the provisions relating to texts.

c) We understand that Arthur Andersen & Co. S.A. has been granted by the Swiss Bank Commission the licence for bank and mutual fund auditing as from August 16th, 1972 and by the Swiss Federal Council the licence to perform the special auditing required whenever a Swiss company plans to reduce its sharecapital as from February 24th, 1976. Criminal conviction for breach of professional secrecy or violation of Article 162 or 273 of the Swiss Penal Code or Article 47 of the Swiss Federal Banking Law might endanger the licence of Arthur Andersen & Co. S.A. to act as bank and mutual fund auditor or as special auditor in case of capital reduction. The final decision would be with the competent authorities and probably depend on the extent of the illegal disclosures. As no licence is needed to perform statutory auditing for ordinary corporations or to perform contractual auditing, Arthur Andersen & Co. could still continue to perform such services in Switzerland.

Question 5:

Under what circumstances may documents or other information be disclosed?

a) is the consent of the client required?

b) is the consent of those involved in the transaction reflected in such documents or data, in addition to the consent of the client required?

c) is consent of anyone else other than the client required?

d) would disclosure be permissible if made pursuant to a request of a party in connection with civil litigation pending in a United States district court?

e) would disclosure be permissible if made pursuant to an order of a United States court directing responses to written question, or production of documents, a violation of which would be punishable by penalties for contempt of court (fine or imprisonment)?

Answer 5:

a), b) and c): *Under Articles 321 and 162* of the Penal Code and *under Article 47* of the Federal Banking Law, documents or other information may be disclosed if the client as the holder of the secret agrees to such disclosure and if no third party interests (e.g. of clients and business partners of the auditor's client) are prejudiced because either the information does not concern third parties or the third parties concerned agree to the disclosure. If the client or the third parties do not agree in advance, they may still waive their right to file a complaint, as, according to Article 29 of the Swiss Penal Code, if within three months no complaint is filed by a party concerned, the Public Prosecutor has no right to prosecute anybody for breach of a manufacturing or business secret pursuant to Articles 162 or 321, what is not the case under Article 47 of the Federal Banking Law since the prosecution may be started "ex officio"

by the Public Prosecutor, i.e. without any private complaint being necessary.

Under Article 273 section 2 of the Penal Code which concerns a crime against the State interests, the consent of the client and of third parties which have any legitimate interest would not be a satisfactory protection for the auditor or accountant since it may be that the public interest of Switzerland and its economy may be violated by such disclosure where no private party is opposed to disclosure. Under this Article 273, the Public Prosecutor has to start prosecution *ex officio* if any legitimate interests of third parties or the public interest of Switzerland and its economy appear endangered.

d) and e): The fact that information is disclosed pursuant to a request of a party in connection with civil litigation pending in a US district court or pursuant to an order of an US court does not make the disclosure legal and would not prevent the companies of Arthur Andersen & Co. in Switzerland, from being liable vis-à-vis its clients, and vis-à-vis third parties connected with its clients, and vis-à-vis the Swiss State for such disclosure as would fall under the perview of the above mentioned provisions.

The only rightful way for US courts to obtain information from Swiss sources would be by means of letters rogatory issued by a civil court or by a criminal court addressed to the Swiss Federal Government through diplomatic channels. The Swiss Federal authorities have sole discretion as to whether or not to communicate such letters rogatory to the competent Cantonal judicial authorities which may order the auditors or their assis-

tants to testify in answer to the questions, provided that the code of civil or criminal procedure in the Canton from which the evidence is required does not prohibit such testimony by accountants or auditors.

Question 6:

Would it be a violation of the laws of Switzerland for Arthur Andersen & Co. to take such documents and data outside of Switzerland and to the United States for the purpose of complying with an order of a United States court?

Answer 6:

Directors, officers and employees of a Swiss auditing firm have a professional or contractual duty to keep secret all facts and documents, not matters of public knowledge, learned by them in the course of their duties. This duty continues to exist after the business relationship between the auditor or accountant and its client has terminated. The production and disclosure of business secrets by directors, officers and employees of your auditing firms in Switzerland to foreign authorities would constitute a breach of professional secrecy (Article 321 of the Swiss Penal Code) and a violation of the Articles 162 and 273 of the Swiss Penal Code as well as in particular cases, a breach of bank secrecy (Article 47 of the Federal Banking Law); these directors, officers and employees will be liable vis-à-vis the clients and third parties whose relationship with the clients and business secrets would be disclosed, unless client and third parties have waived their rights; if disclosure of information is contrary to the interests of the Swiss State and its economy,

which cannot be excluded, they may be held liable where no private party is opposed to disclosure.

The removal outside Switzerland of secret documents by a director, officer or employee of your auditing firms in Switzerland does not in and of itself constitute a violation of above mentioned provisions, provided such person takes all precautions to keep such documents confidential at all times. It is only their disclosure which is prohibited unless prohibition has been waived and information disclosed is not contrary to the interests of the Swiss State.

/s/ Pierre Oederlin

Pierre Oederlin

Exhibit A — Swiss Code of Obligations (Commercial Law)

Article 730

3. Discrétion à observer

Art. 730 (-723) Il est interdit aux contrôleurs de communiquer à des actionnaires individuellement ou à des tiers les constatations qu'ils ont faites dans l'exécution de leur mandat.

Exhibit B — Swiss Penal Code, Article 162

Violation du secret de fabrication ou du secret commercial

Art. 162 Celui qui aura révélé un secret de fabrication ou un secret commercial qu'il était tenu de garder en vertu d'une obligation légale ou contractuelle,

celui qui aura mis à profit cette révélation,

sera, sur plainte, puni de l'emprisonnement ou de l'amende.

Exhibit C — Swiss Penal Code, Article 273

Service de renseignements économiques

Art. 273 Celui qui aura cherché à découvrir un secret de fabrication ou d'affaires pour le rendre accessible à un organisme officiel ou privé étranger, ou à une entreprise privée étrangère, ou à leurs agents,

celui qui aura rendu accessible un secret de fabrication ou d'affaires à un organisme officiel ou privé étranger, ou à une entreprise privée étrangère, ou à leurs agents,

sera puni de l'emprisonnement ou, dans les cas graves, de la réclusion. Le juge pourra en outre prononcer l'amende.

Exhibit D — Swiss Penal Code, Article 321

Violation du secret professionnel

Art. 321 1. Les ecclésiastiques, avocats, défenseurs en justice, notaires, contrôleurs astreints au secret professionnel en vertu du code des obligations, médecins, dentistes, pharmaciens, sages-femmes, ainsi que leurs auxiliaires, qui auront révélé un secret à eux confié en vertu de leur profession ou dont ils avaient eu connaissance dans l'exercise de celle-ci, seront, sur plainte, punis de l'emprisonnement ou de l'amende.

Seront punis de la même peine les étudiants qui auront révélé un secret dont ils avaient eu connaissance à l'occasion de leurs études.

La révélation demeure punissable alors même que le détenteur du secret n'exerce plus sa profession ou qu'il a achevé ses études.

2. La révélation ne sera pas punissable si elle a été faite avec le consentement de l'intéressé ou si, sur la proposition du détenteur du secret, l'autorité supérieure ou l'autorité de surveillance l'a autorisée par écrit.

3. Demeurent réservées les dispositions de la législation fédérale et cantonale statuant une obligation de renseigner une autorité ou de témoigner en justice.

Exhibit E — Swiss Penal Code, Article 3

3. Conditions de lieu
Crimes ou délits commis en Suisse

Art. 3 1. Le présent code est applicable à quiconque aura commis un crime ou un délit en Suisse.

Si, à raison de cette infraction, l'auteur a subi totalement ou partiellement une peine

à l'étranger, le juge suisse imputera la peine subie sur la peine à prononcer.

2. L'étranger poursuivi à l'étranger à la requête de l'autorité suisse ne pourra plus être puni en Suisse pour le même acte:

si le tribunal étranger l'a acquitté par un jugement passé en force;

s'il a subi la peine prononcée contre lui à l'étranger, si cette peine lui a été remise ou si elle est prescrite. S'il n'a pas subi cette peine, elle sera exécutée en Suisse; s'il n'en a subi qu'une partie à l'étranger, le reste sera exécuté en Suisse.

Exhibit F — Swiss Penal Code, Article 4

Crimes ou délits commis à l'étranger contre l'État

Art. 4 [1]Le présent code est applicable à quiconque, à l'étranger, aura commis un crime ou un délit contre l'Etat (art. 265, 266, 266bis, 267, 268, 270, 271, 275, 275bis, 275ter), se sera rendu coúpable d'espionnage (art. 272 à274) ou aura porté atteinte à la sécurité militaire (art. 276 et 277).

[2]Si, à raison de cette infraction, l'auteur a subi, totalement ou partiellement, une peine à l'étranger, le juge suisse imputera la peine subie sur la peine à prononcer.

Exhibit G — Swiss Penal Code, Article 5

Crimes ou délits commis à l'étranger contre un Suisse

Art. 5 [1]Le présent code est applicable à quiconque aura commis à l'étranger un crime ou un délit contre un Suisse, pourvu que l'acte soit réprimé aussi dans l'Etat où il a été commis, si l'auteur se trouve en Suisse et n'est pas extradé à l'étranger, ou s'il est extradé à la Confédération à raison de cette in-

fraction. La loi étrangère sera toutefois applicable si elle est plus favorable à l'inculpé.

[2]L'auteur ne pourra plus être puni à raison de son acte s'il a subi la peine prononcée contre lui à l'étranger, si cette peine lui a été remise ou si elle est prescrite.

[3]S'il n'a pas subi à l'étranger la peine prononcée contre lui, elle sera exécutée en Suisse; s'il n'a subi à l'étranger qu'une partie de cette peine, le reste sera exécuté en Suisse.

Exhibit H — Swiss Penal Code, Article 7

Lieu de commission du crime ou délit

Art. 7 [1]Un crime ou un délit est réputé commis tant au lieu où l'auteur a agi, qu'au lieu où le résultat s'est produit.

[2]Une tentative est réputée commise tant au lieu où son auteur l'a faite, qu'au lieu où, d'après le dessein de l'auteur, le résultat devait se produire.

Exhibit I — Swiss Federal Banking Law

Art 47 1. Celui qui, en sa qualité de membre d'un organe, d'employé, de mandataire liquidateur ou de commissaire de la banque, d'observateur de la Commission des banques, ou encore de membre d'un organe ou d'employé d'une institution de revision agréée, aura révélé un secret à lui confié ou dont il avait eu connaissance à raison de sa charge ou de son emploi.

celui qui aura incité autrui à violer le secret professionnel,

sera puni de l'emprisonnement pour six mois au plus ou de l'amende jusqu'à concurrence de 50,000 francs.

2. Si le délinquant a agi par négligence, la peine sera l'amende jusqu'à concurrence de 30,000 francs.

3. La violation du secret demeure punissable alors même que la charge ou l'emploi a pris fin ou que le détenteur du secret n'exerce plus sa profession.

4. Sont réservée les dispositions de la législation fédérale et cantonale statuant l'obligation de renseigner l'autorité et de témoigner en justice.

Vu pour légalisation de la signature apposée au recto de la présente par Monsieur Pierre OEDERLIN.

Genève, le vingt-neuf mars mil neuf cent soixante-seize.

[Signature]

Vu pour la légalisation de la signature de
M. Philibert LACROIX, not.
apposée ci-dessus.
Genève, le 30 MARS 1976

pr la Chancellerie d'Etat:

[Signature]

Maurice FIUMELLI
commis

CONFEDERATION OF SWITZERLAND
CANTON AND CITY OF BERN
EMBASSY OF THE UNITED STATES
OF AMERICA } SS

I, JUSTICE B. STEVENS, Consul of the United States of America at Bern, Switzerland duly commissioned and qualified, do hereby certify that MAURICE FIUMELLI whose true signature and official seal are, respectively, subscribed and affixed to the foregoing document was, on the 30th day of March, 1976, the date thereof, an Acting State Chancellor of Geneva to whose official acts faith and credit are due.

IN WITNESS WHEREOF I have hereunto set my hand affixed the seal of the Embassy of the United States of America at Bern, Switzerland, this 30th day of March, 1976.

[Signature]

Justice B. Stevens
Consul
of the United States of America

APPENDIX F

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, DATED JUNE 25, 1976 (PORTIONS PERTAINING TO UNRELATED DISCOVERY DISPUTE DELETED)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
M.D.L. DOCKET NO. MDL 79-1
Civil Action No. C-4628

IN RE:
KING RESOURCES
COMPANY
SECURITIES
LITIGATION
STATE OF OHIO,
Plaintiff,

vs.

CROFTERS, INC., *et al.*,
Defendants. } ORDERS RE PENDING DISCOVERY MOTIONS

THIS MATTER comes before the Court on two pending motions filed in the above-captioned litigation by defendant Arthur Andersen & Co.

I

We have considered the Motion of Defendant Arthur Andersen & Co. for an Order Withdrawing Order Concerning Deocuments [*sic*] and Information Located in Geneva, Switzerland and for Entry of a New Order Concerning Such Documents and Information, filed June 17, 1976; as well as Plaintiff's Memorandum in Opposition to Motion of Defendant Arthur Andersen and Co. To Withdraw Discovery Order Concerning IOS, filed June 22, 1976.

This Court is not of a view to establish or supervise a detailed blueprint for the discovery procedures in this regard. Our manifest concern is that discovery in this case has already been inordinately delayed. We are satisfied that professional concern and cooperation will prevail with the result that counsel's efforts will assist the orderly progression of this litigation. To this end, counsel for Arthur Andersen & Co. are directed to meet with counsel for Plaintiff State of Ohio at the earliest possible moment; and in any event not later than 5:00 p.m., Wednesday, June 30, 1976. The Court will then entertain a joint written motion outlining an agreed-upon modified procedure for resolution of this dispute. A report from counsel reflecting inability to reach an agreement or the joint motion referred to above, together with a proposed stipulated order, is to be filed with this Court by 12:00 noon, Thursday, July 1, 1976.

II

* * * *

III

We expressly discourage last minute motions or letters which detract from this and other pending litigation. Consideration for the Court's time should be given before counsel file motions that prompt immediate judicial management. Henceforth, all matters relating to this litigation shall be in motion, not letter, form.

DATED at Denver, Colorado, this 25 day of June, 1976.

BY THE COURT:

/s/ Sherman G. Finesilver
SHERMAN G. FINESILVER, Judge
United States District Court

APPENDIX G

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, DATED JULY 2, 1976 (PORTIONS PERTAINING TO UNRELATED DISCOVERY DISPUTE DELETED)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
M.D.L. DOCKET NO. MDL 79-1

Civil Action No. C-4628

IN RE: KING RESOURCES COMPANY SECURITIES LITIGATION STATE OF OHIO, Plaintiff, vs. CROFTERS, INC., *et al.*, Defendants.	ORDER 1976-9 ORDER RE PENDING DISCOVERY DISPUTES

THIS MATTER comes before the Court for additional orders on pending discovery matters. The Court, having considered the briefs and statements of counsel and the proposed orders tendered therewith, enters the following orders:

ORDERED — This Court's Order, dated May 27, 1976, which stated: "3) Motion for discovery of certain documents of Andersen & Co. is granted . . ." is hereby withdrawn, and with respect to the discovery sought by plaintiff, Andersen shall proceed in the following manner:

A. *Discovery Sought:*

1. Produce for Inspection and Copying by the Plaintiff State of Ohio the Following:

   (a) Reports of examinations, draft reports, working papers, correspondence and news clipping files in the Geneva office of Arthur Andersen & Co., if any, which reflect the decreasing cash flow and liquidity of IOS, Ltd., Fund of Funds, Ltd. (including its subsidiary F.O.F. Proprietary Funds, Ltd.) during the period from September 1, 1969 through May 31, 1970.

2. Answer The Following Interrogatories Propounded By The Plaintiff State Of Ohio And Produce For Inspection And Copying By Ohio The Documents Identified In The Answers To The Questions:

   (a) Did the Geneva office of Arthur Andersen & Co. at any time learn of agreements, negotiations, or any proposed agreements, negotiations, or any proposed agreements or negotiations to the effect that John M. King, KRC, or the Colorado Corporation, alone or in combination, through loans, stock purchases, or in any other manner, proposed to obtain control, ownership, or partial ownership or control of IOS, Ltd.?

   (b) If the answer to (a) above is other than an unqualified negative:

      (1) On what date did the Geneva office of Arthur Andersen & Co. first learn of such a proposal?

      (2) Please identify the person or persons from whom the Geneva office of Arthur Andersen & Co. first learned of such a proposal.

      (3) Please identify the partners, employees, or other persons associated with the Geneva office of Arthur Andersen & Co. who were the first to learn of such a proposal.

      (4) Please identify (and produce for inspection and copying) any and all documents from the Geneva office of Arthur Andersen & Co. reflecting when that office first had knowledge of such a proposal.

      (5) What was the nature of any such proposal at the time the Geneva office of Arthur Andersen & Co. first became aware of it?

      (6) Did the nature of such proposal change over time?

      (7) If the answer to the preceding question is other than an unqualified negative, how did the nature of the proposal change?

   (c) If the answer to (a) above is other than an unqualified negative, what audit procedures or other investigatory steps did you use with respect to or in contemplation of such proposal?

   (d) With regard to the answer to (c) above:

      (1) Please identify (and produce for inspection and copying) all documents from the Geneva office of

Arthur Andersen & Co., including, without limitation, books, manuals, or memoranda which treat generally the subject of audit responsibilities, necessary or advisable procedures, investigatory steps to be taken, or subjects likely to be of concern in conducting audits of enterprises which are contemplating or have entered negotiations with respect to such proposals.

(2) Please identify (and produce for inspection and copying) every document from the Geneva office of Arthur Andersen & Co. relating to audit procedures or other investigatory steps taken by that office with respect to such proposal.

(3) Please identify each partner or employee of the Geneva office of Arthur Andersen & Co. who participated in audit procedures or other investigatory steps with respect to or related to such proposal.

(4) Please identify all individuals at KRC, Investors Overseas Services, or affiliated entities who were contacted by the Geneva office of Arthur Andersen & Co. in the course of employing audit procedures or other investigatory steps with respect to such proposal.

B. *Procedure to Be Followed by Arthur Andersen & Co.*

1. Cause to be concluded the search presently

being conducted of the files of Arthur Andersen & Co. located at Geneva, Switzerland that may contain documents responsive to the above request for production of documents and answers to the above interrogatories, and segregate such documents.

2. On or before July 12, 1976, produce to plaintiff for inspection and copying at any of Andersen's offices in the United States, the documents and information requested. *However,* with respect to any documents or information the release of which defendant believes would subject it to civil or criminal liability under Swiss law, defendant shall, by July 12, 1976:

(i) Exert every effort to obtain the release of such documents or information, through obtaining consents or waivers which may be necessary to comply with this Order and with Swiss law;

(ii) Identify any document (by type of document, subject and title of document, author, addressee, date) or information (by subject matter and source) which has not been produced; state with specificity the grounds including what efforts have been made to effect production, and what efforts are planned to be made.

(iii) Deliver to the Court all documents identified in (ii) above, organized and catalogued in such form that if this Court determines that some or all of such documents must be produced, based on this Court's evaluation both of the reasons given by Andersen for non-production and of efforts exerted by Andersen to effect production, any such documents may be made available without further delay for inspection and copying by plaintiff State of Ohio.

3. On or before July 16, 1976, counsel for Ohio and Arthur Andersen are directed to meet in an effort

to resolve differences respecting any documents or data which have not by that date been produced by Arthur Andersen. Only upon conclusion of such meeting may the parties take such further steps as may be appropriate under the federal rules.

* * *

IT IS FURTHER ORDERED that there will be no interlocutory appeals from discovery orders in this case and the Court will summarily deny applications for same. *Paramount Film Distributing Corp. v. Ritter,* 333 F.2d 358 (10th Cir. 1964); *see also Denson v. Brown,* No. 74-8075 (10th Cir., July 29, 1974 (Appendix No. 13) (Unpublished Opinion).

FURTHER, the Court expressly orders that if, upon *in camera* inspection of the documents subject to claims of attorney-client or foreign law privilege, it appears that such claims were made frivolously or without good faith, the Court will impose sanctions.

DATED at Denver, Colorado, this 2 day of July, 1976.

BY THE COURT:

/s/ Sherman G. Finesilver
SHERMAN G. FINESILVER, Judge
United States District Court

APPENDIX H

EXCERPTS FROM THE DOCKET SHEET OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, REFLECTING ORDERS OF JULY 23, 1976.

STATE OF OHIO
VS.
CROFTERS, INC., ET AL } C-4628 Page 19

DATE 1976 PROCEEDINGS

* * *

7/23

* * *

ORDERED: that the Swiss documents shall be produced to the State of Ohio by Aug. 19, 1976.

* * *

ORDERED: as to documents containing deletions and self-editing counsel shall confer; and, if necessary, the entire document is to be submitted to the Court for in camera inspection.

* * *

ORDERED: Imposition of sanctions are withheld until further order of Court.

eod 7/23.

* * *

APPENDIX I

SUPPLEMENTARY OPINION OF SWISS COUNSEL

Lenz, Schluep, Briner & De Coulon
Avocats au Barreau de Genève
25, Grand'Rue • 1211 Genève 11

TO WHOM IT MAY CONCERN

AFFIDAVIT

You have advised us that the U.S. District Court has ordered that Arthur Andersen & Co. produce for the Court's inspection all documents located at the Geneva office, the release of which Arthur Andersen & Co. believe would subject them to civil or criminal liability under Swiss law. You have asked us whether it would be a violation of Swiss law for Arthur Andersen & Co. to produce such documents to the Court itself.

As said in our legal opinion dated March 29, 1976, the fact that business secrets would be disclosed pursuant to an order of a U.S. Court would not make the disclosure legal and would not prevent the directors, officers or employees of Arthur Andersen & Co. from being liable of a violation of Swiss law. This applies equally even when the production ordered is only to the Court. Disclosure of such business secrets to the Court itself would render the directors, officers or employees of Arthur Andersen & Co. liable to sanctions for violation of Swiss law.

Dated this 9th day of July 1976 at Geneva.

/s/ Jean-Paul Aeschimann
Jean-Paul Aeschimann

APPENDIX J

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, DATED JULY 16, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-4628

STATE OF OHIO,
Plaintiff,
v.
CROFTERS, INC., et al.
Defendants.

ORDER — No. 11.

By 5:00 p.m., July 19, 1976, plaintiff's counsel is directed to file brief in support of Plaintiff's, (State of Ohio), Motion For Imposition of Sanctions filed July 15, 1976; Defendant, Arthur Andersen & Co., is to file its brief in opposition to said Motion and brief by 5:00 p.m., Wednesday, July 21, 1976. Said documents are to be hand carried to other counsel and the Court.

The Motion will be considered by this Court on Thursday, July 22, 1976 at 1:30 p.m. — time heretofore set for supplemental pretrial in this action.

All pending Motions will also be considered on said date and time.

DATED at Denver, Colorado, this 16 day of July, 1976.

BY THE COURT:

/s/ Sherman G. Finesilver
SHERMAN G. FINESILVER, Judge
United States District Court

APPENDIX K

EXCERPTS FROM TRANSCRIPT OF HEARING ON JULY 22, 1976 BEFORE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

* * *

The Court is not going to rule on the question of sanctions to this extent other than that the Court has vast powers of sanctions. *National Hockey League vs. Metropolitan Hockey Club* underscores the vast, strong power that the Court has even to dismiss a case, but I'm suggesting that in the coolness of the hour tomorrow morning that Counsel ought to meet together, and I'm directing that Mr. Patrick be there with your associates.

* * *

I'm satisfied that perhaps in the light of day tomorrow Counsel are going to meet in the offices of Holland & Hart and see to what extent, if any, you might be able to come to some grips with the mutual progression of this case in the spirit of cooperation that should have prevailed in this case from the very first filing.

The Court will take the question of sanctions under advisement. The Court will meet with Counsel tomorrow morning at eleven o'clock. You are to meet in Mr. Hobson's office at 8:15.

* * *

APPENDIX L

EXCERPTS FROM TRANSCRIPT OF HEARING ON JULY 23, 1976 BEFORE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

• • •

THE COURT: The Court is going to direct that as expeditiously as possible, even on a day-by-day basis, at such time as the Swiss documents are obtained by Arthur Andersen's Counsel, they shall be given to the State of Ohio, their Denver Counsel, that in no event shall this extend beyond the 20th of August.

Now, I want it clearly understood that the 19th of August is the cutoff date. The cutoff date is tonight for documents that you can get by tonight, but in any event, with or without consents, the Court wants full compliance by the 20th of August on these 20 or 25 documents, even if it necessitates activity through the State Department or it necessitates activity through the Swiss courts.

I am not enamored with the approach to Swiss law taken by Defense Counsel. However, this period of time will no doubt, I'm sure, produce these documents. The Court is withholding the appointment of an expert in Swiss law to come over from Switzerland who is versed in Swiss law and American law to give testimony on this point. I do not want to add to the cost of litigation of five or ten thousand dollars at least and go to a peripheral issue on 25 documents.

• • •

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-873

ARTHUR ANDERSEN & CO.,
Petitioner,

v.

STATE OF OHIO, THE HONORABLE SHERMAN G. FINESILVER, UNITED STATES DISTRICT JUDGE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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January 20, 1977

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, not yet reported, is printed in petitioner's Appendix B.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether a party objecting to an order to produce documents on grounds of foreign legal prohibitions may obtain appellate relief when the trial court has yet to rule finally either on the foreign law objections or on the matter of possible sanctions for failure to produce?

2. Whether a party may assert foreign anti-disclosure laws as grounds for refusing to comply with discovery orders without first showing that it has exerted in good faith every effort to comply by means which would not violate foreign law?

STATEMENT OF THE CASE

A. Overview of the Factual Background: A Continuing Discovery Dispute

This petition arises amid the fourth phase of a still unfolding pretrial discovery controversy. The litigation was commenced in 1972 by respondent State of Ohio ("Ohio"). Following a series of stays and other events which postponed significant discovery until late October 1975, Ohio requested production of documents and information, including certain materials in the Geneva, Switzerland office of defendant-petitioner Arthur Andersen & Co. ("Andersen"). For seven months Andersen resisted Ohio's discovery requests on various grounds.

The second phase of the dispute began in April of 1976 when Ohio moved for an order compelling production of certain of the documents it had been seeking. (Appendix A, p. 20). Andersen resisted the order, and five more weeks of extensive and detailed briefing ensued. This phase ended in late May of 1976 when the court granted Ohio's motion to compel during a hearing on several outstanding discovery matters.

There followed a third phase of the controversy lasting about seven weeks. The court, which had not immediately entered a detailed order governing the mechanics of production, was successively urged by Andersen to withdraw its initial order, to modify it, and then to delay its implementation. During this phase the court twice postponed the deadline for compliance; in later, more detailed orders it modified its initial ruling by directing Andersen to exert every effort to produce documents as to which Andersen asserted its inability to comply due to Swiss law.

The fourth phase has yet to conclude. It arose in connection with what Andersen called its "voluntary" or "good faith" efforts at compliance. In mid-July of 1976 Ohio moved for sanctions on the grounds that a good faith effort to comply had never been made by Andersen and was not then being made. The trial court has yet to rule finally either on Ohio's motion for sanctions or on Andersen's contentions under Swiss law. In late July the court postponed for a third time the deadline for Andersen's compliance. Andersen appealed the initial order to the United States Court of Appeals for the Tenth Circuit; it appealed each subsequent order, and it filed a petition for a writ of mandamus.

The nine volumes of the record on appeal in the Tenth Circuit include more than 800 pages of briefs, transcripts and memoranda setting forth the rather elaborate factual background and legal contentions of the parties. On December 1, 1976, the Tenth Circuit dismissed the interlocutory appeals, finding that Andersen had not made a sufficient factual showing to merit appellate intervention in the ongoing discovery process. It added: "When and if a subsequent order of the court imposes a harmful sanction, that order may then be reviewed." The Tenth Circuit also found that the challenged orders usurped no power, and denied Andersen's petition for mandamus.

Because the Tenth Circuit's refusal to intervene in the discovery in this case rests expressly upon the absence of an adequate factual premise, and as the "prerogative writs" also turn decisively upon the circumstances of each case, Ohio sets forth below in greater detail facts which Ohio believes are essential to this Court's consideration of the petition.

B. The Background in Pertinent Detail

Ohio's allegations against Andersen in this case relate to Ohio's purchase in the Spring of 1970 of $8 million in securities of King Resources Company ("KRC"). The securities were never redeemed, and KRC subsequently filed a petition in bankruptcy.

In purchasing the securities, Ohio relied upon financial statements of KRC audited by Andersen, and upon Andersen's unqualified opinions that those statements fairly presented the financial position of KRC. Ohio asserts that those statements did not fairly present KRC's financial position in that, among other things, they failed to disclose the extent of KRC's dependence upon a principal customer, failed to disclose that the customer was approaching financial collapse, that KRC had embarked on a costly and risky attempt to take control of and rescue its principal customer, and that the principal customer was The Fund of Funds, Ltd. ("F.O.F."), a nonresident offshore Canadian mutual fund controlled by Investors Overseas Services, Ltd. ("I.O.S."), another nonresident Canadian corporation.

F.O.F. and I.O.S. maintained their principal offices in or near Geneva, Switzerland. Both had been forbidden by a 1967 Order of the Securities and Exchange Commission from doing business within the Commission's jurisdiction. Both were audited by Andersen.

Documents pertaining to Andersen's audit services for I.O.S. were requested from Andersen on October 24, 1975. During the next seven months Ohio and Andersen exchanged numerous pleadings and memoranda respecting Andersen's objections to the discovery. The trial court monitored the controversy and intervened where necessary, frequently emphasizing its concern that both the moving party and the objecting party must present a proper factual foundation for all discovery motions. On December 16, 1975, for example, the district court told Andersen:

> "The Court is satisfied that there must be more particularity as to why there are any privileges, and the Court, without making this a law of the case or the rule of the case, is satisfied that the broad generalities of any foreign secrecy laws are not very persuasive at this point . . . Again, any claims of foreign law prohibitions are to be made

> with specificity. The Court directs the answers should be complete and responsive."

"Reporter's Official Transcript of Court's Ruling of December 16, 1975," p. 6.

When Ohio received Andersen's objections to the motion to compel and the opinion of Andersen's Swiss lawyers, Ohio responded in two ways. First, Ohio immediately contacted the major entities whose consent would, according to the opinion, assist in effecting production of the documents at issue. By this means, Ohio obtained consents from representatives of The Fund of Funds, Ltd., I.O.S. Growth Fund, Ltd., and FOF Proprietary Funds, Ltd. Andersen replied only that these "purported" consents might well be invalid, and that the court could afford them no weight unless Andersen's Swiss lawyers assented.

Second, Ohio responded with a new proposed order replacing that attached to its initial motion to compel. The new order included a provision specifically directed to documents whose production Andersen believed would violate Swiss law, requiring only that as to such material Andersen "exert every effort" to obtain any required consents so as to comply with Swiss law. (Appendix B, p. 34).

On May 26, 1976, the district court having reviewed the factual proffer made by Ohio in its motion to compel and having reviewed the briefs filed afterwards, declared:

> "Item No. 3, Discovery of certain items held in Andersen's Geneva office. This was originally filed on the 15th of April, 1976. Later filings were on that same day, the 30th of April, and the 10th of May. We recognize that our original order was that discovery was to be limited to the continental United States. We are satisfied that the plaintiff has made a good showing for the discovery of these items in the Geneva office, and we accordingly grant the discovery of these documents held in Andersen's

> Geneva office. We will impose no sanctions in regard to this item."

"Reporter's Official Transcript of Proceedings Held May 26, 1976," p. 9.

Three more weeks passed. Andersen produced none of the requested material. Instead it asked the court to withdraw the May 26 order, arguing that it had been "caught by surprise" and needed more time to consider the "ramifications" of the order. It also advised the court that it now desired to determine the effect of the consents supplied by Ohio, which it had previously rejected out of hand.

The trial court's response was to call upon Ohio and Andersen to meet together in a spirit of "professional concern and cooperation" to try to agree upon a modified procedure that would resolve the dispute. The court stated that it would then entertain a joint motion respecting such a modified procedure. Before the meeting ordered by the court could be held, Andersen appealed the May 26 order.

After Andersen's appeal, Ohio met with Andersen twice in attempts to seek a modified procedure. At both meetings Andersen flatly refused to agree to any order that would require it even to "exert every effort" to effect production of documents from its Swiss offices. Ohio independently submitted such an order to the trial court. Andersen offered its own proposed order. On July 2, the trial court withdrew its initial order and essentially adopted Ohio's proposal—an order that Andersen "exert every effort" to produce. The order also stated that if on July 16 any documents were still withheld, Ohio and Andersen were to confer in an effort to resolve their differences.

One week before such a conference was to be held, however, Andersen appealed that July 2 order. It also advised the trial court that *for the first time* its lawyers had actually reviewed the documents in its Geneva office. The lawyers reported there were only 220 documents which pertained to

Ohio's requests and that Andersen would produce what it described as the "responsive portions" of 190 of those documents in the week of July 12.

The week of July 12 passed. No documents were produced. Instead Andersen delivered to Ohio a "protective order" to which it required Ohio's agreement before production of what Andersen referred to as the "redacted" documents, even though these concededly contained no "business secrets." (One such "redacted" document is appended hereto as Appendix C, p. 36).

On July 15, Ohio finally asked the court to impose sanctions for the reason that the pattern of bad faith on Andersen's part had now become unmistakable. On July 16, the court set a hearing on the motion for July 22 at 1:30 p.m.

Until 10:30 a.m. on the morning of July 22, no documents were produced. At that hour Andersen delivered its first tangible response to Ohio's requests and the court's orders: a five-page document containing no business secrets and responding to interrogatories originally filed by Ohio in December of 1975, a list of documents which Andersen refused to produce, and 80 newspaper clippings. (One of the clippings is reproduced as Appendix D, p. 38). At the hearing that afternoon, the court criticized Andersen's insistence on a protective order before submitting answers to Ohio's interrogatories. Andersen conceded this had been unnecessary. (Appendix E-1, p. 40). The court also demanded to know why Andersen had withheld until that morning documents it knew to contain no business secrets. Counsel for Andersen replied that he was "not focusing" on delay as being a problem. (Appendix E-2, p. 41). At the conclusion of the July 22 hearing, the court stated:

> "I think that the balance in regard to lack of cooperation weighs heavier on the one side than the other and, of necessity, I have to say that Arthur Andersen's position in some respects is not borne

> out by some of the pleadings or some of the observations or some of the chronology of events in this case."

"Reporter's Official Transcript of Proceedings Held July 22, 1976," p. 82.

The court, however, imposed no sanctions; it indicated its reluctance to do so, and stated that it would take that matter under advisement. It then directed both parties to meet concerning the unproduced documents and it set another hearing for the next morning. At that hearing the court postponed for the third time, to August 19, the deadline for Andersen's compliance with Ohio's discovery requests. Even should Andersen on that date continue to withhold documents, the court stated that it would, if necessary, appoint an expert in Swiss law to give testimony concerning Andersen's Swiss law claims.

On August 4, however, before the conference suggested by the court could be held and 15 days before the newly extended compliance date, Andersen appealed the July 23 order.

Presently Andersen continues to withhold approximately thirteen documents, together with numerous "portions" of documents which it edited on grounds of "relevance."[1] The court has expressed its disapproval of Andersen's prior editing of documents (Appendix E-3, p. 41). Following discussions between Ohio and Andersen, Andersen has produced the complete versions of some of this previously "redacted" material. Almost all of the documents recently produced have come from what Andersen identifies as "non-Geneva" sources, *i.e.*, sources as to which Swiss secrecy could never have been a relevant or proper objection. Andersen has offered no explanation of why it did not long ago turn to its "non-Geneva" sources for the documents it claims to have tried so hard to produce.

[1] On January 7, 1977, Andersen informed Ohio that it had obtained the consent of I.O.S., pursuant to which it "expects" to produce during the week of January 10 all but two of the withheld documents, together with additional portions of documents which it previously produced in edited form.

On January 14, 1977, Andersen informed Ohio that the withheld documents which it had expected to produce during the week of January 10 had been mailed from Geneva on January 13 or 14 and would be produced during the week of January 17. Additional portions of documents previously edited by Andersen were offered to Ohio subject to a protective order, to which Ohio agreed.

ARGUMENT

I. AS THE OPINION OF THE TENTH CIRCUIT EMPHASIZES, THIS CASE IS NOT RIPE FOR REVIEW, SINCE THE "ISSUE" UPON WHICH ANDERSEN POSITS ITS NEED FOR APPELLATE INTERVENTION REMAINS OPEN AND UNDECIDED IN THE TRIAL COURT

Andersen's brief leaves no doubt as to the issue upon which its petition rests: the opinion below, Andersen says, improperly "requires" Andersen either to disobey a federal court order or else to violate Swiss law:

> "Andersen, meanwhile, is inextricably *caught between the Scylla of obedience with Swiss law/disobedience of the court's orders and the Charybdis of disobedience of Swiss law/compliance with the court's orders.* Andersen's position simply is that an order which places a defendant in such a position is contrary to law." [Emphasis supplied].

Andersen's Petition, p. 11.

Andersen repeats this contention in less colorful terms not once or twice but nine more times. (Andersen's Petition, pp. 3, 4, 5, 7, 9, 10, 13, 15, 16). But the argument, and the petition, must fail, for as the district court recognized, and as the Tenth Circuit has affirmed, Andersen's "dilemma" is precisely as mythical as Scylla and Charybdis.

As for Andersen's "Scylla," Andersen may by appropriate means obtain appellate review of a contempt sanction (but not of its own ironic speculations as to how and why it

might be held in contempt for what the trial court *may* eventually decide Andersen has failed to do). That is the common sense thrust of the *Alexander* doctrine which has governed the appealability of discovery orders in the federal courts for more than 70 years:

> "Let the court go farther, and punish the witness for contempt of its order—then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case."

Alexander v. *United States*, 201 U.S. 117, 121 (1906). See also, *United States* v. *Ryan*, 402 U.S. 530 (1971).

As for the supposed "Charybdis," nobody is requiring Andersen to violate Swiss law. If sanctions are imposed it will be because of Andersen's bad faith, not simply because certain documents were not produced. But the fact is that it has never suited Andersen's appellate purposes to acknowledge that a door is open to it in the trial court. Thus, when Andersen cites the court's insistence that August 19 or 20 must be the deadline for Andersen to produce the documents or else show why it cannot do so, Andersen omits the court's equally firm statement that it will still be willing to consider proper expert testimony concerning any Swiss law objections as to documents not produced. The following is the final paragraph of the court's statement as cited by Andersen in Appendix L of its petition. The material *after* the asterisks is a part which Andersen "redacts":

> "I am not enamored with the approach to Swiss law taken by Defense Counsel. However, this period of time will no doubt, I'm sure, produce these documents. The Court is withholding the appointment of an expert in Swiss law to come over from Switzerland who is versed in Swiss law and American law to give testimony on this point. I do not want to add to the cost of litigation of five or ten thousand dollars at least and go to a peripheral issue on 25 documents.
>
> • • •

> "However, there's no question that this Court will go on this tack if there's still any contention that these can't be produced under Swiss law because I very well feel that under the preliminary research that this Court did there's an unusually rigid approach being taken by Swiss Counsel in regard to what the implications are of that law and Counsel for Arthur Andersen would be well advised to read some of the Tenth Circuit cases dealing with Swiss law."

"Reporter's Transcript of Proceedings Held July 23, 1976," pp. 32-33.

Ohio has submitted to the trial court that Andersen has not responded in good faith. Andersen has asserted the contrary. Until the factual disputes underlying these claims are ruled upon by the trial court, based on the detailed record with which it is most familiar, Andersen's petition must remain just as amorphous as the present posture of the dispute.

In *Kerr* v. *United States District Court for the Northern District of California*, ___ U.S. ___, 48 L.Ed. 2d 725 (1976), this Court recently had occasion to consider the application of mandamus in the context of a pretrial discovery controversy, which it found to be unresolved and unripe. Reaffirming the critical requirement of finality in the federal appellate system, the Court stresses the fact that the district judge in *Kerr* "apparently left open the opportunity for petitioners to return to the District Court, assert the privilege more specifically and through responsible officials, and then have their request . . . reconsidered in a different light . . . ." 48 L. Ed. 2d at 733. The *facts* of the present discovery controversy, not Andersen's tale of Scylla and Charybdis, show that far from having pursued all other adequate means of obtaining the relief which it sought, it was, and it still is Andersen's practice to seek interlocutory remedies well before exerting ordinary, let alone ex-

traordinary efforts to attain its declared objective, *i.e.*, protection from asserted adverse consequences of disclosure under Swiss law. Because Andersen's petition, as that of *Kerr*, is fundamentally defective respecting the requirement of ripeness, the petition should be denied.

II. NO CONFLICT AMONG CIRCUITS IS PRESENTED BY THE CASES CITED BY ANDERSEN; INDEED, SEVERAL OF THOSE CASES OFFER SIGNIFICANT SUPPORT FOR THE OPINION BELOW

Andersen asserts that until the trial court entered the orders in this case "all relevant judicial precedent in this country supported Andersen's position." (Petition, p. 11). For this proposition it cites without analysis or factual summary five Second Circuit cases, quoting three sentences from two of them.

The problem here is not to refute Andersen's statement; rather, it is to respond concisely to an assertion that is wrong and misleading in such panoramic fashion. When one actually examines what those cases hold, and the facts upon which they rest, there is no conflict, either of law or of fact, between any of them and the opinion and judgment of the Tenth Circuit in this case.

Trade Development Bank v. *Continental Insurance Co.*, 469 F.2d 35 (2d Cir. 1972), affirms a district court decision not to compel production of documents revealing the identity of Swiss bank account holders; the case is not pertinent here because the trial court had specifically ruled, as the appellate court observed, that the material sought by the moving party "is not a relevant issue in the case," 469 F.2d at 40. Here, on the contrary, the district court found after extensive briefing by both parties that Ohio had "made a good showing" for the requested documents, and it has

adhered to that view through many months of Andersen's delay and outright defiance.[2]

Nor does *First National City Bank* v. *Internal Revenue Service*, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960), conflict with the opinion of the Tenth Circuit in this case. On its *facts* the case simply holds that the discovered party, again a New York bank, failed to make a sufficient showing that it would incur any penalty under foreign law by complying with a government subpoena. In *dictum*, the Second Circuit observes that if in fact production of records would "require" violation of Panamanian law, production should not be ordered. As noted, this matter remains open in the present case. In the same case, the Second Circuit also imparts some advice to which Andersen understandably does not refer:

> "If the Bank cannot, as it were, serve two masters and comply with the lawful requirements both of the United States and of Panama, perhaps it should surrender to one sovereign or the other the privileges received therefrom . . . ."

271 F.2d at 620.

In *United States* v. *First National City Bank*, 396 F. 2d 897 (2d Cir. 1968), the Second Circuit firmly upholds a civil contempt sanction against a New York bank which

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[2] Both in the Tenth Circuit and now in this Court Andersen has misleadingly cited in its memoranda the trial court's use of the word "peripheral" in comments from the bench at the July 23, 1976 hearing. The term occurred in the court's statement that it wanted a firm deadline for compliance, that it would appoint a Swiss law expert, but preferred if possible, not to increase unnecessarily the cost of litigation. (See Andersen's Appendix L). As Ohio pointed out in the Tenth Circuit, the district court has never said the documents were peripheral to the *issues*. It has ruled to the contrary. But, incredibly, Andersen again has the trial court saying that the discovery is peripheral to the case. (Petition, p. 14, footnote). Andersen's effort to distort the trial court's words and turn them against that court can hardly fortify its petition.

failed to comply with a subpoena for production of documents possessed by its branch in Germany. The opinion underscores the trial court's finding of bad faith on the part of the New York bank for failure to examine the records whose production it resisted. Similarly in this case, Andersen repeatedly and stridently asserted its imminent jeopardy and proffered the opinion of its Swiss lawyers, which it has now included in the appendix to its petition—all before any of Andersen's lawyers, American or Swiss, had even bothered to review the documents sought by Ohio. Unlike *First National City Bank*, there has been no ruling by the district court here on the crucial matter of bad faith.

Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962), affirms the trial court's modification of a subpoena for records of a Panamanian branch of a New York bank. The opinion notes that the modification was proper in order to avoid the "necessity" of violating foreign law. In the present case the trial court has already declared its willingness to entertain a proper showing that foreign law rather than tactical self-interest has prompted Andersen's resistance.

Ings v. *Ferguson*, 282 F.2d 149 (2d Cir. 1960), the last of Andersen's five cited cases, is completely inapposite to Andersen's claim. There the appellate court's expression of concern for the effect of a discovery order involving foreign documents is specifically directed to a foreign non-party witness ordered to produce its documents in this country.

> "Under these circumstances it seems highly undesirable that the courts of the United States should countenance service of a subpoena upon a New York agency of a foreign bank which is not a party to the litigation and whose country has provided procedures for securing information, the production of which is consistent with its laws."

282 F.2d at 152.

Andersen is no bystander here. It can scarcely argue that it is entitled to whatever special consideration may be due to a foreign non-party witness.

As Andersen points out, the Tenth Circuit has noted some of the cases and commentary which criticize the reasoning of the early Second Circuit opinions to the extent which that reasoning departs from *Societé Internationale* v. *Rogers*, 357 U.S. 197 (1958). What Andersen ignores, what is manifest upon comparison of any of those cases with the present one, and what undermines Andersen's petition is that on the facts which are actually before this Court, not the events hypothesized by Andersen, the Second Circuit cases present no conflict.

III. NO NOVEL OR SUBSTANTIAL QUESTION DISTINGUISHES THIS CASE, WHICH FALLS SQUARELY WITHIN THE PRINCIPLES ESTABLISHED BY THIS COURT IN *SOCIETÉ INTERNATIONALE* v. *ROGERS*

It has been more than a year now since Ohio first requested documents from Andersen's Geneva offices. In that time, by one dilatory maneuver after another, Andersen has converted a Rule 34 request into an enormously expensive, time-consuming struggle which has finally brought this lawsuit to a standstill.

Always Andersen has excused its tactics of avoidance as a painful duty reluctantly but nobly performed in the service of various higher principles; higher, that is, than the Federal Rules. Most of these "principles" are collected in Andersen's petition. Sometimes Andersen cites "international comity." (Petition, p. 10). On other occasions it speaks of its concern for "the foreign operations of American firms," (Petition, p. 16), or it refers broadly to the "integrity of the domestic laws and public policies of foreign sovereign states." (Petition, p. 10). It has pointed

also to "the political and economic interests of the United States which are furthered by international trade and commerce." (Petition, p. 10). It has even relied upon the "state interest of Switzerland." (Petition, p. 6).

With due respect to these important causes, in this case they have never been anything but theater. As the Tenth Circuit said in commenting upon Andersen's asserted regard for "international comity":

> "If the problem involves a breach of friendly relations between two nations, Andersen should call the matter to the attention of those officers and agencies of the United States charged with the conduct of foreign affairs, and they could make such representation to the court as they deemed suitable. Andersen has not taken this action. Instead, it purports to speak for the United States." (Opinion of the Tenth Circuit, Andersen's Petition, p. 27).

One way of placing this case into perspective is to set it alongside *Société Internationale* v. *Rogers*, 357 U.S. 197 (1958), the leading case concerning the proper role of foreign law in controversies over production of documents. In *Société* this Court was confronted, first of all, with a fully ripened discovery dispute. The district court had dismissed the action of the plaintiff Swiss holding company for failure to comply with an order to produce documents in its Swiss offices. Speaking for a unanimous Court, Mr. Justice Harlan found a sanction as harsh as dismissal to have been unjustified because the company had unquestionably acted in good faith. The initial, unqualified order of the trial court to produce the documents was upheld, however, despite the fact that the documents were protected by Swiss law. This Court said:

> "Whatever its reasons, the petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can

> hardly affect the fact of non-compliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply."

357 U.S. at 208.

Thus the Tenth Circuit was correct in holding that Andersen or any litigant cannot avoid discovery "through the assertion of violation of foreign law." "Assertion" is the key word. For at the point where only the order of production, not the matter of sanctions for failure to produce, is at issue, the discovered party has not yet demonstrated that the documents are without its control. That is the absolutely fundamental matter which remains open and unresolved in the trial court in this case.

It is difficult to know what Andersen would make of *Société*. It claims to rely on the case. But it also presents in its petition a strained effort to distinguish *Société* on the grounds that the present case does not involve the Trading with the Enemy Act, and that here the discovered party is not a Swiss national. This effort cannot disguise the fact that the circumstances of the present discovery controversy are put in shadow by those which confronted the Supreme Court in *Société*.

1) In *Société* there was never any question of the good faith of the discovered party. The moving party, the Master appointed by the trial court, the trial court, as well as the appellate court all agreed that a good faith effort had been made. That question is very far from settled in this case. Ohio believes it will eventually be determined against Andersen.

2) The number of documents to be produced in *Société* was in the hundreds of thousands. By its own effort to obtain consents, the discovered party effected production of 180,000 documents. Here, when Andersen finally troubled to inspect its files in Geneva, it declared that only some

220 documents were responsive to Ohio's request. Forty per cent of these were news clippings, and 90 per cent of the other documents or the "responsive portions" thereof contained nothing secret.

3) In *Société*, the Swiss Federal Prosecutor not only expressed his government's interest in the case, but formally intervened by confiscating most of the documents subject to the district court's order of production. Here, despite Andersen's allusions to Swiss "state interests," not one Swiss official has ever expressed the slightest interest in this lawsuit.

The only extraordinary aspect of Andersen's posture here is the continuing unnecessary challenge to the authority of the trial court and the Federal Rules. On July 23, 1976, the district court said:

> "The problems on discovery, I'm satisfied, were brought about because Counsel—this is primarily Defense Counsel—for some unknown reason did not realize the spirit, the tenor of the Federal Rules of Civil Procedure as it relates to discovery.
>
> "The American court system has much resiliency, it has flexibility, but this system is going to come to a halt if we can't have the cooperation of experienced, professional attorneys . . . I dare say that our system is going to have some problems if we are going to stay afloat."

"Reporter's Official Transcript of Proceedings Held July 22, 1976," p. 59.

Ohio would submit that there are no questions in this case which merit review, and that in any event as the record now stands the appropriate sequel to the Tenth Circuit's opinion and judgment is the prompt resolution of this discovery controversy in the trial court.[8] Ohio believes that with the continued firm superintendence of the district court this can be accomplished, and that it must be accomplished, without further delay. The Tenth Circuit has very recently declared its similar conviction; on January 7, 1977 that court denied Andersen's motion to stay the mandate, saying:

> "The issue relates to an interlocutory discovery order. No sanction has been imposed for non-compliance. The case has been pending since April, 1972, and should go forward."

(Appendix F, p. 43).

[8] Although the mandate of the Tenth Circuit issued on January 10, 1977, none of the dire consequences predicted by Andersen has occurred.

CONCLUSION

For these reasons it is respectfully submitted that the petition should be denied.

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January 20, 1977

APPENDIX A

OHIO'S MOTION TO COMPEL, SUPPORTING MEMORANDUM AND PROPOSED ORDER, APRIL 15, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
M.D.L. DOCKET NO. MDL 79-1

In Re: STATE OF OHIO Plaintiff, vs. CROFTERS, INC. et al., Defendants	PLAINTIFF'S MOTION TO COMPEL FURTHER AND COMPLETE DISCOVERY, CONCERNING I.O.S., AND MEMORANDUM IN SUPPORT THEREOF

Plaintiff State of Ohio, pursuant to Rule 37 of the Federal Rules of Civil Procedure, moves this Court to compel defendant Arthur Andersen & Co. to provide further and complete discovery pertaining to two specific matters, as follows:

1. The first matter is contained in Request 26 of plaintiff's Second Request for Production of Documents, served on October 24, 1975. Request 26 sought production of:

> Reports of examination, draft reports, working papers, workpapers, correspondence files and permanent files of Andersen relative to examination after January 1, 1967 of IOS.

On December 16, 1975, this Court ruled that Request 26 was meritorious. Yet defendant has never produced, from its Geneva offices, any of the documents sought in Request 26. As will be more fully set forth in the attached memorandum, plaintiff has more than ample reason to believe that such documents exist and that they are directly material to

fundamental issues of this case. In order further to facilitate their prompt production, plaintiff now particularizes Request 26 as follows:

> Reports of examinations, draft reports, working papers, correspondence and news clipping files in the Geneva office of Arthur Andersen & Co. which reflect the decreasing cash flow and liquidity of IOS and its subsidiary Fund of Funds during the period from September 1, 1969 through May 31, 1970.

2. The second matter is contained in plaintiff's Interrogatories, Third Set, served upon Arthur Andersen on December 26, 1975, together with plaintiff's requests for production of documents therein identified. Interrogatory 73 of the Third Set stated:

> Did you at any time learn of agreements, negotiations, or any proposed agreements or negotiations to the effect that John M. King, KRC, or the Colorado Corporation, alone or in combination, through loans, stock purchases, or in any other manner, proposed to obtain control, ownership, or partial ownership or control of Investors Overseas Services?

Defendant answered, "Yes." Interrogatories 74, 78 and 79 of the Third Set then inquired about the circumstances under which this knowledge was obtained by Andersen, any investigatory steps taken by Andersen as a result of the knowledge, and any documents relating to such knowledge or investigation. Again, defendant has never identified or produced from its Geneva offices any such documents. Rather, defendant has maintained that it has already produced from its Chicago and Los Angeles offices all relevant documents. On March 30, 1976, this Court denied "at this time" plaintiff's motion to compel answers to these and other interrogatories in the Third Set. Plaintiff strongly believes that evidence of the existence in Geneva of documents directly material to Interrogatories 74, 78 and 79, as described

in the attached memorandum, requires that these interrogatories be fully answered and that *all* documents relevant to these interrogatories be supplied.

Wherefore, and for the reasons stated in the attached memorandum, plaintiff moves this court:

1. To compel defendant Arthur Andersen & Co. to produce fully and completely the documents sought in Request 26 (as further particularized and limited in this motion) of Plaintiff's Second Request for Production of Documents;

2. To reconsider and to compel defendant Arthur Andersen & Co. to respond fully to Interrogatories 74, 78 and 79 of Plaintiff's Interrogatories, Third Set, and to produce all documents identified in such responses.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
M.D.L. DOCKET NO.—MDL 79-1

In Re: STATE OF OHIO Plaintiff, vs. CROFTERS, INC., et al., Defendants.	MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL FURTHER AND COMPLETE DISCOVERY CONCERNING IOS

I. THE INFORMATION AND DOCUMENTS WHICH PLAINTIFF SEEKS FROM ANDERSEN'S GENEVA OFFICE BEAR UPON ISSUES WHICH ARE BOTH CLEARLY FOCUSED AND CRITICAL TO THIS CASE.

Plaintiff's instant Motion requests documents relating to two key questions:

1) What did defendant Arthur Andersen know, before releasing its 1969 audit report for King Resources, about the seriously deteriorating financial condition of KRC's single most significant customer, Investors Overseas Services;

2) What did defendant Arthur Andersen know, before releasing its 1969 audit report for KRC, about urgent negotiations and plans by John King and KRC to take over control of the deteriorating IOS operations, at tremendous cost, and equivalent risk, to KRC?

Upon these questions in turn depend many of the other contested issues in this lawsuit. These relate not just to what Andersen knew by April 24, 1970, when it released its KRC audit, but what it should have *inquired* about *based* on

its knowledge, and what it should then have properly disclosed in its audit report to millions of present and potential investors who in early 1970 had themselves been reading confusing reports about the threatened IOS operation.

The accounting and financial issues in this case are often complex but certainly it takes no extensive accounting expertise to confirm that if Andersen knew, before releasing its 1969 KRC audit, that IOS was listing dangerously, then Andersen was required to make appropriate disclosures in its KRC report. Andersen *did* know that IOS was the biggest customer of KRC. Andersen *did* know that one IOS account, the natural resources account of Fund of Funds, accounted for at least one-fourth of KRC's total 1968 revenues, for more than one-third of KRC's total 1969 revenues, and for two-thirds of KRC's net profits in 1969. Andersen knew also that by year-end 1969 the investments of IOS itself in KRC and KRC entities amounted to $65 million. To that extent at least, as IOS went so went KRC. As of April of 1970, IOS was going sour. As the troubles of its president Bernard Cornfeld multiplied, and stockholders began dumping their holdings, IOS liquidity and cash flow had severely declined. When and to what extent Andersen became aware of these facts must be a decisive element in judging whether, as plaintiff contends, Andersen utterly defaulted on its obligation fairly and properly to audit KRC.

Similarly, it takes no insider's familiarity with KRC and its numerous entities to recognize that if Andersen knew, before issuing its 1969 KRC audit, that John King and KRC were actively negotiating for and planning to assume control, at enormous cost, of this fragile IOS empire, that knowledge should have been brought to bear on the 1969 KRC audit. In fact, in the 1969 audit there was not even a single mention of IOS. Plaintiff contends that Andersen had considerable knowledge concerning the projected takeover of IOS by KRC, and that Andersen did not employ what it knew either responsibly or, indeed, candidly in preparing its 1969 KRC report.

II. PREVIOUS DEPOSITION TESTIMONY AND EXHIBITS DEMONSTRATE UNAMBIGUOUSLY THAT THE DOCUMENTS AND INFORMATION WHICH PLAINTIFF SEEKS EXIST IN ANDERSEN'S GENEVA OFFICE.

A. Andersen's Geneva Office Knew of the Failing Financial Condition of IOS by April 24, 1970 When the KRC 1969 Audit Was Released

Request 26 of Plaintiff's second request for production is supported not simply by a common sense appraisal of what Andersen must have realized regarding IOS, an Andersen *client*, but on testimony and documents showing Andersen was in fact greatly worried by its knowledge. Three documents show Andersen's knowledge in graphic fashion.

First, on April 13, 1970, 11 days before Andersen's KRC report was issued, Allen Brodd, the accountant in charge of Andersen's Geneva office sent a memorandum from Zurich seeking assistance from the Chicago office. The Geneva office was, at that critical period which also preceded the release of the KRC audit, preparing the IOS report. Brodd told the Chicago office:

> We have unresolved many major problems which may require qualifications. Discussions of these matters are requiring my full time. The only manager here is Don Pearson who must return to Detroit Saturday. It is necessary that I have Martini for at least two weeks beginning Monday. Also, I will probably need Lynch for two weeks sometime later. I hope you will be able to work those out because this is an extremely critical period. I am sending this from Zurich where I have met with Tenz and Clavedetscher but neither can give me the help I need.
>
> I am sending a copy of this to March to keep him informed. We have already mailed copies of Lon-

> don newspaper reports. I have also kept John Rule and Dick Brandt in London fully informed.

Obviously this is no casual reference to a peripheral concern in Geneva. It is nothing less than an SOS signal.

The IOS account was in such serious difficulty that "qualifications" might be required in the report. This communication from Brodd could only have been based on the very Geneva documents sought by plaintiff's Request 26. In this context it is, at the least, disingenuous of Andersen to proclaim that all relevant documents have been produced from other Andersen offices.

Two days later, on April 15, 1970, Don Pearson, another accountant in the Geneva office, sent a telex to the Chicago office, which concluded:

> I am also enclosing copies of selected newspaper articles for your information. There are many rumors going around, each one a little more far fetched than the last. The sinking stock prices have shocked a lot of people at IOS and this might be of long range benefit to the Company.
>
> IOS management feels that the article from the London Sunday Times—April 12, 1970—is the fairest.

Thus Pearson had apparently raised the IOS publicity with IOS management, and had obtained their judgment as to which article was most accurate. Plaintiff is entitled to have these news clippings as well as all other documents which show what the Geneva office knew about IOS and when they obtained their information.

Finally, on April 16, still eight days *before* release of the KRC 1969 audit by Andersen, Mr. Brodd again communicated by telex from the Chicago office of Andersen. Brodd reviewed his discussion with Edward Cowett, with whom John King was then negotiating in order to obtain control of IOS. He noted:

> "we discussed the current 'Bear Raid' on the stock and he said that perhaps it had benefitted the company by forcibly reminding them they must keep a liquid position."

In sum, then, these documents show that in the two week period before Andersen issued its unqualified audit of KRC for 1969, Andersen's Geneva office was aware of a raid on the stock of IOS, KRC's largest customer; Andersen's Geneva office was collecting news articles about IOS's worsening plight, and the Geneva office audit of IOS had reached the point where a qualified report was in prospect. Plaintiff submits that its Request 26, as further defined in the instant Motion, is by any reasonable definition calculated to lead to the discovery of evidence of the highest relevance and materiality. On December 16, 1975, this Court granted Request 26. The Court said:

> "Request No. 26, as defined by plaintiff, the request is—the Court is satisfied that it's meritorious. The defendant Andersen is to produce all relevant documents in this regard whether in the Denver office or elsewhere." (Reporter's Transcript, Court's Ruling, p. 4.)

Prior to the Court's ruling, plaintiff had limited its request to the Denver, Chicago, and Los Angeles offices of Arthur Andersen. But plaintiff had expressly reserved the right "to seek inspection of documents on file in other offices should the need for this be uncovered during the course of the initial inspections." (Plaintiff's Motion to Compel Discovery and Certificate of Compliance with Local Rule 6(e), November 18, 1975, p. 5.)

Plaintiff submits that the above discussion amply demonstrates the need for production of documents from the Geneva office relevant to plaintiff's further refined Request 26.

B. Before Andersen Released the 1969 KRC Audit, its Geneva Office Not Only Possessed Information Concerning the Projected KRC Assump-

tion of Control Over IDS [sic] But Had Even Been Consulted by King Concerning His Negotiations.

As part of John King's plan to assume control over and revive IOS, KRC's troubled principal customer, King planned in early 1970 to purchase IOS stock then owned by the Edward Cowett family trusts and held by King as security for his loan to Cowett. That the Geneva office was in close touch with these negotiations is apparent in the April 16 communication from Allen Brodd in Andersen's Geneva office to the Chicago office. Brodd commented on his two-hour discussion with Cowett the previous day. He specifically noted that the KRC loan to Cowett had been discussed:

> We reviewed briefly financial holdings statements and he raised no objections at this time to specific disclosures. He said he would furnish us additional information with respect to the Cowett Family Trust and the King Trust. Both of these amounts are supported by substantial value in addition to IOS stock, he said, together with personal guarantees. I made the point that there were two parts to the question—one was the "subject to" on financial holdings statements and (2) the presentation on IOS Ltd. I said that if sufficient additional collateral were produced or there was solid evidence that the trust included other values which were not encumbered and were available to support the loan this could remove the "subject to" on financial holdings.

Problems connected with King's Geneva bank loans incidental to his planned purchase of IOS stock were also discussed with John King himself in some detail by Leonard Spacek, Chairman of Arthur Andersen & Co. Spacek's file memorandum of May 5 and May 6, 1970 reflects a conversation after release of the 1969 audit; nevertheless, the memorandum compels the conclusion that Andersen's knowledge

of King's plans concerning IOS was concrete, detailed and, for King himself, significant:

> I told Mr. King that the Bahamian Trust Funds, particularly the one for his family, become an important factor if King Resources is going to supply money to own IOS stock. This seems to me to put those funds and King Resources in a conflicting position, and he can't avoid the fact that it is related to him indirectly, if not directly, although he has no control. He said that that is one of the things to be done today; and that cash will be put into the bank by King Resources to take over the loans and all the IOS stock held as security will be purchased by King Resources as one of the steps, in addition to the $20 million being put into IOS directly with warrants to purchase additional stock. He also said that King Resources is taking over Cowett's loan to the bank and buying his stock at his cost, plus 25%, so that he and King's loan at Geneva bank will both be paid out. We should verify this as part of our December 31, 1969, audit and make sure that whatever disclosure is made conforms to the facts up to date.

King, says Spacek, cannot avoid the fact that as KRC takes steps to control IOS, IOS is "related to him indirectly, if not directly." Plaintiff is surely entitled to know the information which the Geneva office possessed and to examine documents in that office concerning the "steps" in the KRC plans to control IOS. Interrogatories 74, 78 and 79 specifically request what investigating steps were taken by the Geneva office respecting King's plans. Andersen has replied that no "services" were performed. This is evasive and inadequate. Allen Brodd's two-hour conversation with Edward Cowett demonstrates as much. Defendant should now be compelled to provide full and candid responses to these three interrogatories and to provide documents identified in such responses.

III. DEFENDANT ANDERSEN'S BROADLY STATED OBJECTIONS TO ANY DISCOVERY OF INFORMATION IN ITS GENEVA OFFICE ARE OUTWEIGHED BY THE MATERIALITY OF THE SPECIFIC INFORMATION PLAINTIFF SEEKS

To previous requests by plaintiff for the information and documents which are the subject of the present Motion, defendant Andersen has raised wholly undefined blanket objections of burdensomeness, Swiss secrecy laws, and the flat assertion that production from other Andersen offices must suffice.

Any merit defendant's burdensomeness objection may once have possessed must now be negated by plaintiff's presentation of only these few specific inquiries. In any event, burdensomeness lacks meaning unless compared with the weight on the other side of the discovery scales, the relevance of the discovery sought. Plaintiff submits that its showing of materiality as to the specific items in the present Motion far more than outweighs any burden of compliance by Andersen. Indeed, when called upon in 1968, 1969 and 1970 to serve the accounting requirements of John King's business entities around the world, Andersen found no serious obstacle to coordinating for King its own worldwide offices. Now, when plaintiff seeks to unravel some of the knots tied during those years, Andersen should not be permitted to raise these dubious obstacles, at least not without far more substantial grounds than have so far been presented.

Respecting Andersen's tenacious loyalty to the alleged demands of Swiss secrecy law, this Court stated on December 16, 1975:

> This Court is satisfied that the broad generalities of any foreign secrecy laws are not very persuasive at this point . . . if there is going to be any question of foreign secrecy laws, they are going to have to be specified with great particularity

> and specificity. This Court directs the answers should be complete and responsive. (Reporter's Transcript, Court's Ruling, p. 6.)

Defendant Andersen's secrecy claim is no less opaque now than it was four months ago.

Finally, Andersen's assertion that all relevant documents have been produced from its other branch offices, can hardly survive a recent collision with the representations of its own counsel:

> (Mr. Shaw) In order to clear up a possible misconception that might have been left as a result of some questions this morning, some questions were asked with regard to working papers located in Geneva. Through my own fault, I believe I may have, and through the nature of the questions to the witness, we may have given the impression that there are copies of all work papers of Arthur Andersen & Company located in Geneva and that such work papers would have copies located in one or more offices of the Andersen Company in the United States. That is not true. I did not mean to give that impression, and we would like to correct the record to that effect.
>
> • • •
>
> (Mr. Shaw) That is, the United States offices of Andersen & Company probably would not have copies of such papers located in Andersen & Company's office in Geneva; is that correct?
>
> (The Witness) That is right.
>
> (Mr. Shaw) That is all I had to say.
>
> (Deposition of Allen C. Brodd, Arthur Andersen & Co., January 26, 1976, pp. 67-68)

CONCLUSION

Plaintiff respectfully submits that the instant Motion seeks production of material which is specific, discrete, and patently relevant. Plaintiff requests the Court to grant plaintiff's Motion and to approve the attached proposed Order.

Respectfully submitted

OF COUNSEL:

HOLLAND & HART

By .....
Harry L. Hobson

/s/ LUKE J. DANIELSON
.....
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
M.D.L. Docket No. MDL-79-1

C-4628

In Re:
King Resources Company Securities Litigation

STATE OF OHIO, Plaintiff, vs. CROFTERS, INC., et al. Defendants.	ORDER

This matter having come before the court upon Plaintiff's Motion to Compel Further and Complete Discovery Concerning I.O.S., and the court having considered the briefs of the parties,

IT IS HEREBY ORDERED, that Defendant Arthur Andersen & Co. shall no later than ....., respond fully and completely to Plaintiff's Document Request No. 26, as follows:

> Reports of examinations, draft reports, working papers, correspondence and news clipping files in the Geneva office of Arthur Andersen & Co. which reflect the decreasing cash flow and liquidity of I.O.S. and its subsidiary Fund of Funds during the period from September 1, 1969 through May 31, 1970.

IT IS FURTHER ORDERED, that Defendant Arthur Andersen & Co. shall, no later than .....,, respond fully and completely to Plaintiff's Interrogatories 74, 78 and 79 in Plaintiff's Interrogatories, Third Set, and shall include therein any and all pertinent information and documents in the Geneva offices of Arthur Andersen & Co.

.....
Sherman G. Finesilver,
District Judge

APPENDIX B

OHIO'S REVISED PROPOSED ORDER RESPECTING DOCUMENTS IN GENEVA, SWITZERLAND, MAY 10, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
M.D.L. Docket No. MDL-79-1

C-4628

In Re:

King Resources Company Securities Litigation

STATE OF OHIO, Plaintiff, vs. CROFTERS, INC., et al. Defendants.	ORDER

This matter having come before the Court upon Plaintiff's Motion to Compel Further and Complete Discovery Concerning IOS, and the Court having considered the contentions of the parties:

IT IS HEREBY ORDERED, that defendant Arthur Andersen & Co. shall, no later than _____, respond fully and completely to plaintiff's Document Request No. 26, as follows:

> Reports of examinations, draft reports, working papers, correspondence and news clipping files in the Geneva offices of Arthur Andersen & Co. which reflect the decreasing cash flow and liquidity of IOS and its subsidiary Fund of Funds during the period from September 1, 1969 through May 31, 1970.

IT IS FURTHER ORDERED, that defendant Arthur Andersen & Co. shall, no later than _____, respond fully and completely to Plaintiff's Interrogatories 74, 78 and 79 in Plaintiff's Interrogatories, Third Set, and shall include therein any and all pertinent information and documents in the Geneva offices of Arthur Andersen & Co.

[IT IS FURTHER ORDERED, that as to any documents or information the release of which defendant believes would subject it to civil or penal liability under Swiss law, the defendant shall:

1. Exert every effort to obtain the permission of the Swiss Government, or to obtain such consents or waivers as may be necessary to comply with this Order and with Swiss law;
2. Report to this Court no later than _____ concerning its compliance with this Order, including a summary of documents and information which have been produced, any items as to which defendant claims a privilege and has not yet obtained necessary permission or waivers, defendant's efforts to obtain such permission or waivers, and its plans respecting the production of such items.]

_____

Sherman G. Finesilver, Judge
United States District Court

APPENDIX C

ONE OF DOCUMENTS EDITED BY ANDERSEN BEFORE PRODUCTION TO OHIO, PRODUCED ON AUGUST 13, 1976

Remarks concerning I.O.S., Ltd. AHQ 12-31-69

1976-12

(21)

Comments concerning discussions with officers -

Finally, we had discussions with John King and his representatives.

1976-12

APPENDIX D

NEWS CLIPPING PRODUCED BY ANDERSEN ON JULY 22, 1976

APRIL 30

Going 'Mad' Over Money

Sharp Drop in IOS Stock Price Worries Investors, May Be Linked to Wall Street

By Neil Ulman
Staff Reporter of The Wall Street Journal

GENEVA — In an office looking out over Lake Leman and Mt. Blanc in the distance, a haggard official of Investors Overseas Services mutters grimly into a telephone in French, trying to squelch a rumor:

"No, no, no. That's ridiculous. Absolutely crazy," he declares, his voice hoarse, deep circles under red-rimmed eyes. The man has been at his phone all day long for the last week and a half issuing denials. "Bernard Cornfeld isn't dying of cancer. Top management hasn't resigned. There isn't any run on I.O.S. banks." And so on.

"Where do they get such ideas?" asks Harold Kaplan, the weary vice president and director of public relations for I.O.S. Ltd., the parent company for the huge international financial complex. "Where money is concerned," he sighs, "people go absolutely mad."

With I.O.S., which manages $2.3 billion of assets in mutual funds, real estate, banks and insurance companies operating throughout the Free World, money is very much concerned. And suddenly the many thousands of investors who have bought stock in the parent holding company, its fund management subsidiary or, in its mutual funds have every reason to be concerned for their money.

The stock of I.O.S. Ltd., which was offered last fall at $10 a share and traded as high as $19.75, was quoted yesterday in Geneva at $4.50 bid, $5 offered.

Shares of Investors Overseas Management Ltd., the 77%-owned subsidiary that manages more than $60 million of assets for the group's mutual funds, have plummeted from a high last spring of near $87 to $11 bid, $11.75 asked.

The funds they handle have, relatively speaking, fared better, or, more correctly, not so bad. The net asset value of Fund of Funds was listed yesterday at $20.55 a share, off 13.8% from the end of the first quarter a year ago. The net asset value of International Investment Trust yesterday was $7.46 a share, off 31.8% from the end of March 1969. In that same period, by comparison, the Dow Jones industrial average has dropped 21.2%.

There's little doubt, however, that rumors about the I.O.S. complex are jangling the nerves of some holders of I.O.S.-managed funds.

Americans are spared the anguish. None of the issues are registered with the Securities and Exchange Commission and none can be sold in the U.S. or to Americans overseas. But the tremors of discontent could rumble in the U.S., as well, since much of I.O.S.'s vast holdings are invested in American securities. Any precipitous selloff would severely intensify Wall Street's woes of late. Indeed, I.O.S.'s troubles may be a factor in the recent U.S. stock market decline.

'Disturbing' Elements

Ironically, I.O.S.'s troubles began not because the company is doing poorly, but because it isn't doing as well as its advance men had said. An I.O.S. official blandly dropped the bomb a few weeks ago. He said the parent company expected to report 1969 earnings of about $20 million, or 40 cents a share. That would be up from $14.4 million, or 31 cents a share, a year before. But it would be a far cry from the earnings of $30 million that some I.O.S. officials had been predicting last year.

With the bloom off the earnings rose, banks and brokers began to take a closer look at the company's operations and they unearthed what they considered some "disturbing" elements.

They noted, for example, that a Dec. 29 sale of arctic mineral exploitation permits by I.O.S.'s Fund of Funds and Growth Fund brought about a last-minute, dramatic improvement in their end-of-year performances.

Analysts, too, began to raise anew an I.O.S. underwriting of a Commonwealth United Corp. debenture issue of last summer that turned sour and the purchase of some of the securities by an I.O.S. fund.

They complained, further, of an intracompany sale on March 31 that transferred a Canadian mutual fund company from the parent to its management subsidiary. Some critics concluded the transaction put an unfairly low price on the management company's stock.

In the reassessment, down went I.O.S. shares, and along came more troubles.

As the price of the stock tumbled, many investors who had bought I.O.S. stock on margin, including some I.O.S. employes, were besieged by their bankers for additional cash. Pulling out the margin calls, among others, was Overseas Development Bank, I.O.S.'s Geneva-based bank, which had permitted some investors to put as little as 50% down.

With the calls, more shares were sold, and I.O.S. shares plunged even further.

First Big Setback

I.O.S., of course, has had plenty of losers for company during this general market decline. For I.O.S., however, this is the first big setback after a seemingly endless string of wins. "It's been a tempering experience for all of us," one official says.

Until now, the story of I.O.S. and its founder and chairman, Mr. Cornfeld, has been a tale of brash, seemingly unbounded expansion.

The former Brooklyn Eagle Scout and Philadelphia social worker began his financial career selling shares of Dreyfus Fund in Paris in 1956. In 1958, when French exchange controls began to pinch, he moved to Geneva. By 1960 he had incorporated I.O.S. By 1962 he had created Fund of Funds, a mutual fund that began by buying shares of other mutual funds, and International Investment Trust, still the two biggest I.O.S. funds.

But those were only the base. New funds were created to take advantage of differing tax laws in different nations. Highly trained and highly organized salesmen, working essentially on commission only, peddled the funds in investment programs tailored to meet the needs of investors of different lands.

For investors signing up for long-term programs, I.O.S. created insurance companies that guaranteed to pay the full amount of an investment plan in the event of a customer's death. For investors wishing to borrow money to buy I.O.S. fund shares, it created banks. When equity markets began to lose their luster, I.O.S. created vehicles for investing in real estate.

To propel the growth, I.O.S. staged lavish parties for its sales force. Cruises aboard a luxurious yacht in Geneva's Lake Leman were dangled as an extra inducement to success. Secretaries, file clerks and executives alike lunched elegantly at low prices in a mahogany-paneled, wall-to-wall carpeted reproduction of a fine Edwardian restaurant.

A Switch to Tourist Class

But now I.O.S. executives are being ordered to go tourist instead of first class, or phone or write if these will do.

The sales force, which was supposed to climb to 20,000 by the end of last year, is going to be trimmed from its 15,000 high of last summer to about 14,000 men. Some new supervisors recently brought over from the U.S. with their families and household goods have been told they aren't needed and are being shipped back home.

A spokesman talks of "drastic cost cutting, maybe cutting our expenses down from $60 million or $80 million to $40 million or $50 million."

Edward M. Oswell, president and chief operating officer, tells I.O.S. fund managers the company is de-emphasizing the "super stars," those independent analysts who were entrusted portions of fund assets and rewarded on the basis of short-term performance.

In their place, says another company executive, "we're bringing in mature, thoughtful fund managers, no more swingers." There, too, there will be more research. But company officials are reluctant to say just how many "prudent managers are being hired, just how much more in-house research will be performed.

Despite its problems, insists a spokesman, "our company is sound."

To the bearded Mr. Cornfeld, "ugly and ill-founded rumors" are responsible for the sharp decline of I.O.S. stock. He points specifically to "German banks which sell mutual funds in competition with I.O.S." He charges they have been advising their clients to shun I.O.S. offerings and take the bank shares, instead.

West German bankers, for their part, are especially incensed about allegations that they are selling I.O.S. shares short, that is, selling borrowed stock now in hopes of replacing it later when the market is lower. "Nonsense," scoffs an executive of Deutsche Bank AG in Frankfurt. A Dresdner Bank AG official proclaims, "West German banks aren't allowed to make short sales."

"Something to Think About"

Mr. Cornfeld, in defending I.O.S. operations, allows the company's earnings haven't lived up to advance expectations. Still, he says, the com- y will report 1969 earnings "very comfortable ... / up" from the year before. "Nearly every fund management company in the U.S. is losing money. We're making money. That's something to think about," he declares.

He concedes, though, "We're in a profit squeeze, a problem we never really had before." And he explains that when "an organization is only going in one direction, up, sometimes certain costs may be overlooked. Now that we see the problem, we're doing a lot of cost cutting," he says.

I.O.S. emphatically denies that the squeeze on profits has produced a squeeze on cash. As of earlier this week, a spokesman says, fully 40% of the Fund of Funds' $800 million of assets was held in cash. Of International Investment Trust's $691 million of assets, 20% was in cash. For the complex overall, about $700 million, or almost one-third of total assets, was in interest-bearing cash deposits "by deliberate policy," the company says. I.O.S. wouldn't comment on the liquidity of its unmeash assets.

I.O.S. says further that, with all the adverse publicity, its funds managed to sell more shares than they redeemed in the first 14 days of the month. The gross cash inflow for the first half of April was put at $50.5 million, when redemptions totaled $34.9 million, giving the funds a net cash inflow for the period of about $11.4 million.

If the pattern were extended for the full month, though, this would indicate a net inflow for April of about $23 million. That would be down from an average monthly inflow of $30.9 million in the first quarter. And it would extend a decline that has been crimping I.O.S. operations for months. From a quarterly high of $313 million in the second period last year, fund net cash inflow slipped to $120 million in the third quarter, $130 million in last year's final quarter and $108 million in the first quarter this year.

Still, insists an I.O.S. official, "this isn't a leverage company. We haven't any debt. On the contrary, we have working capital we're seeking to invest. We're a lot less vulnerable to a business slowdown than companies that might hurriedly be called upon to pay off loans."

I.O.S. also rejects as "ridiculous" rumors that the company's banks are in trouble. An official, however, is unable to produce statements of condition for Orbis Bank, I.O.S.'s 60%-owned German bank, or Banca Provinciale di Depositi e Sconti, the 80%-owned Italian operation. For Overseas Development Bank, he provides a year-end statement showing $97 million in deposits, $20.6 million of "current accounts with debit balances" and $17.3 million of "fixed advances and loans." The spokesman says there hasn't been any "substantial change" since year-end.

As for the clouds over I.O.S. operations, the company has some explanations.

The sale of Arctic exploitation rights, the company says, was timed for tax reasons involved in the sale itself and had nothing to do with any desire for a last-minute boost in fund assets.

The two I.O.S. funds, the company says, last June acquired a 50% interest in mineral exploitation rights on 20 million acres of Arctic territory east of the North Slope. They bought the interest from King Resources, a company in which, not so incidentally, I.O.S. funds had large positions. After bidding for North Slope leases had pushed up the value of these rights in the early autumn, I.O.S. says, it got an offer from oil interests, including a large U.S. oil company, to buy 50% of the I.O.S. funds' 50% stake.

The company denied that I.O.S. changed its mind to sell its interests in the same year it bought them. So King Resources in December sold the oil group an identical 50% interest at 10 times the price I.O.S. had paid for the shares. On that basis the I.O.S. fund holdings were revalued upward. Then I.O.S. actually sold its 50% interest to King Resources in January in what amounted to a "wash" or flow-through transaction for King Resources.

That the timing just happened to push up the per-share asset value of the two I.O.S. funds just before year-end was sheer coincidence, I.O.S. says.

Explanation for Intracompany Sale

I.O.S. also has a ready explanation for the intracompany sale of Canadian Channing Corp. "It never occurred to us" that the public would think it was valuing the I.O.S. Management's shares under the market when I.O.S. Ltd. took 600,000 of the management company's shares for a property it had bought the day before for $7 million. Although this seemed to indicate that I.O.S. valued the shares at $17.50 each when they were selling in the open market at $33 a share, it wasn't so, I.O.S. insists.

The 600,000-share price was arrived at through a formula designed to neither dilute nor give an undue increase to the management company's earnings from the acquisition of Channing. It had nothing to do with the market value of the management company's stock, I.O.S. officials say.

Mr. Cornfeld didn't have any ready explana-

tions for I.O.S.'s two ventures into corporate underwriting last year: A $20 million convertible debenture issue for Gilfen International N.V., of which International Investment Trust acquired $7.5 million, and a $20 million convertible debenture issue by Commonwealth United, in which International Investment Trust took a $7.5 million stake. By last week, those Gilfen debentures were quoted on the open market at half their face value. The trust by year-end had listed its Commonwealth United holdings at well under half the purchase price.

"We probably won't be managing any new issues in the future," says Mr. Cornfeld.

APPENDIX E

EXCERPTS FROM TRANSCRIPTS OF HEARINGS CONDUCTED BY TRIAL COURT, JULY 22-23, 1976

E-1. July 22, 1976

[COUNSEL FOR ANDERSEN]: Your Honor, we filed the response to the interrogatories, as to why the interrogatories couldn't be answered, where we have a problem that we are trying to overcome, but those were also served this morning.

THE COURT: Were these interrogatories as a result of this Court's order of the 26th of May?

[SECOND COUNSEL FOR ANDERSEN]: Yes, those are the interrogatories—

[COUNSEL FOR ANDERSEN]: Those are the interrogatories that are the subject of that order.

THE COURT: And your statement to the Court is that substantially these have been responded to today with several narrow issues?

[SECOND COUNSEL FOR ANDERSEN]: One area.

[COUNSEL FOR ANDERSEN]: One small area of information that we have had difficulty because of the Swiss legal problems answering. It's been identified in the answers to interrogatories.

THE COURT: Why weren't they answered before today?

[COUNSEL FOR ANDERSEN]: The same problem. We wanted them to be covered by the protective order and we now would agree with Plain-

tiff's attorney's position on that that we were in error on that and that it was not necessary to have the protective order.

E-2. July 22, 1976

THE COURT: I'm satisfied on these non-privileged documents that [Counsel for Andersen], who is familiar with the orders of this Court and the rules in the United States under discovery, could have brought many of these documents with him without any question through Customs, without security, without any other exigencies, without any impediments, and without any delay of having to have these documents clear Customs several weeks before and additional delay.

Now, I would like you to respond to this question: What was your understanding, please, when these documents were to be submitted to Counsel under the Court's order?

[COUNSEL FOR ANDERSEN]: Going back and operating at this point, Your Honor, under the May 26th order, we — and at that time there wasn't really any schedule, as we understood it, other than we were going to make our best efforts, and I recognize now in retrospect in view of the creation of all this confusion and the firing of papers back and forth, I really wish that we had done that, but at the time I was not focusing on it as being a problem.

E-3. July 23, 1976

THE COURT: I sense Counsel's argument is that Arthur Andersen has been the editor. They decided, well, we are going to pick and choose.

[COUNSEL FOR ANDERSEN]: That's true.

THE COURT: And we are going to delete, even though there's been no adjudication by the Court or there's been no protective order or anything—we are going to determine what we are going to surrender up and what we are not [going to] surrender up, and I think that was the argument yesterday, and I think that's [Counsel for Ohio's] argument today is that the editor has been Arthur Andersen instead of the Court.

APPENDIX F

ORDER OF UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING ANDERSEN'S MOTION FOR STAY OF MANDATE, JANUARY 7, 1977

NOVEMBER TERM—JANUARY 7, 1977

Before Honorable David T. Lewis, Chief Judge, Honorable Jean S. Breitenstein, Senior Judge, and Honorable William E. Doyle, Circuit Judge.

ARTHUR ANDERSEN & CO., Petitioner, vs. HONORABLE SHERMAN G. FINESILVER, etc., et al., Respondents.	No. 76-1618

PETITION FOR
WRIT OF MANDAMUS
(D.C. No. C-4628)

STATE OF OHIO, Plaintiff-Appellee, vs. ARTHUR ANDERSEN & CO., Defendant-Appellant.	No. 76-1632 76-1633 and 76-1710

This matter comes on for consideration of the appellant Arthur Andersen and Company's motion for stay of mandate pending application to the Supreme Court for Writ of Certiorari. The Court has ordered and received responses by the opponents of record and has considered them.

Upon consideration whereof, it is the order of the Court as follows: Andersen's motion for stay of mandate is denied. The issue relates to an interlocutory discovery order. No sanction has been imposed for non-compliance. The case has been pending since April, 1972, and should go forward.

/s/

HOWARD K. PHILLIPS
Clerk

In the

Supreme Court of the United States

October Term, 1976

No. 76-873

ARTHUR ANDERSEN & CO.,
Petitioner,

v.

STATE OF OHIO, THE HONORABLE SHERMAN G. FINESILVER, UNITED STATES DISTRICT JUDGE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI

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AUTHORITIES CITED

Cases:

Other Authorities:

Federal Rules of Civil Procedure

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ARTHUR ANDERSEN & CO.,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI

Petitioner Arthur Andersen & Co. ("Andersen") submits this Reply Brief in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("the Petition") and in response to two arguments in opposition to the granting of the Petition raised by Respondent, State of Ohio ("Ohio"), in the Brief For Respondent In Opposition, served on January 22, 1977 ("Brief"), which arguments are not addressed by Andersen in its Petition.

ARGUMENT

THE QUESTION PRESENTED FOR REVIEW— THE PROPRIETY OF THE ENTRY OF DIS-

COVERY ORDERS WHICH BY THEIR TERMS DIRECT ANDERSEN TO VIOLATE THE LAWS OF SWITZERLAND—HAS BEEN DECIDED FINALLY, AND ADVERSELY TO ANDERSEN, BY THE LOWER COURTS; THE QUESTION, THUS, IS ONE WHICH IS RIPE FOR REVIEW BY THIS COURT

In its Petition Andersen requests this Court to consider a single question—whether, in the circumstances presented by this case a United States Court may properly *enter* a discovery order which *by its terms* directs the discovered party to violate the criminal and civil laws of a friendly, foreign, sovereign state. Andersen's position is that a United States Court abuses its power by the entry of such an order and that the error thus committed is offensive to principles of fairness and, as significantly, is inimical to the political and economic interests of this country which are furthered by international comity and international trade.*

---

*Ohio (Brief, pp. 15-16) mocks Andersen for addressing in its Petition the economic and political considerations which any court orders mandating conduct by a litigant in a foreign sovereign state necessarily call into play.

Apparently, Ohio would have this Court pretend that the dispute here is indistinguishable from any ordinary civil discovery dispute. This case, however, is manifestly not an ordinary civil discovery dispute between litigants with wholly domestic operations. Andersen is an international firm and, in addition, this case involves not only the interests of the litigants but also the interests of Switzerland—a foreign, sovereign state with which the United States has friendly relations—the national policy of which, as expressed in its criminal and civil statutes, unequivocally prohibits Andersen from doing that which Ohio has requested and that which the lower courts have directed.

Surely, the validity *vel non* of the lower courts' orders cannot be determined, fairly or properly, by pretending that the types of economic and political considerations which flow from the conflict between judicial proceedings in this country and the policies and laws of a foreign country—which considerations Andersen addresses in its Petition—are non-existent.

Ohio, in its Brief, nowhere explicitly states that Andersen's position on this question is wrong or that United States courts can, indeed, legally enter orders directing a party to act in violation of the laws of a foreign sovereign state. Rather Ohio seeks to persuade this Court to deny Andersen's Petition by raising two other claims: first, that no orders of the type described by Andersen have, *in fact,* been entered here; and, secondly (no matter what type of orders have been entered and no matter whether the entry of those orders was legal or not), that this Court should not review Andersen's Petition until such time as Andersen has disobeyed the discovery orders and been sanctioned for such disobedience.

We briefly address each of these contentions below.

I. The District Court Has Unequivocally And Dispositively Directed Andersen To Violate The Laws Of Switzerland And The Court Of Appeals Has Affirmed The Entry Of Those Orders

The first of Ohio's two claims is variously stated in Ohio's Brief. For example, Ohio suggests at one point that "the trial court has yet to rule finally . . . on the foreign law objections" (Brief, p. 1). It states later that "nobody is requiring Andersen to violate Swiss law" (Brief, p. 10) and that whether Andersen has been required to act in conflict with Swiss law is a "matter [which] remains open in the present case" (Brief, p. 13). And it represents that,

> "The trial court has already declared its willingness to entertain a proper showing that foreign law rather than tactical self-interest has prompted Andersen's resistance." (Brief, p. 14).

But, however stated, Ohio's single contention here appears to be that, in fact, Andersen has not been directed to vio-

late the laws of Switzerland and that therefore Andersen has nothing to complain about and the "Question Presented" in Andersen's Petition is a figment of Andersen's imagination.

This ostensibly "factual" claim by Ohio is simply wrong.* The language of the district court's discovery orders (see Appendices D, G and H to Andersen's Petition) includes no qualifications or modifications conditioning Andersen's obligation to comply upon compliance with Swiss law, nor do the orders reflect any disposition by the court to reconsider its thrice-repeated mandate *to produce*.

Indeed, the only material difference between the court's later orders and its first order of May 27, 1976 is that in the later orders the court established inflexible deadlines for compliance — deadlines fully effective *regardless* of whether Andersen then still faced the constraints of Swiss

*A considerable portion of Ohio's Brief (pp. 2-9) is devoted to a statement of other such purportedly "factual" claims. While Andersen disputes the accuracy of much of this putative chronology of proceedings, most of it is irrelevant to the legal question presented by our Petition and deserves no response. We do pause, however, to comment upon two facts which are relevant and may have been obscured by Ohio's dissertations upon the irrelevant.

First, however hard Ohio might strain to interpret otherwise the district court's unambiguous reference to this discovery dispute as being "peripheral" to this lawsuit (Brief, p. 13, n.2), the fact is that the district court said "peripheral" and, presumably, meant "peripheral." This characterization of the relevance, or relative irrelevance, to this case of the disputed documents is significant for the reasons discussed in Andersen's Petition, p. 14.

Secondly, the fact established below which has perhaps the greatest importance to deciding the validity of the district court's orders is ignored in Ohio's Brief, *i.e.*, Ohio does not dispute that in the record upon which the district court made its rulings, and upon which the Court of Appeals affirmed those orders, the opinions of Andersen's Swiss counsel interpreting and applying Swiss law stand *without any contradiction* in support of Andersen's position that the orders require Andersen to violate Swiss laws and, therefore, subject Andersen and its personnel to the possible imposition of grave sanctions.

law.* Those deadlines have passed; Andersen has been unable to produce all the documents in question in compliance with Swiss law; hence, because of the expiration of the stay issued by the Court of Appeals Andersen, in order to comply fully with the district court's orders, is again in the posture of being "required to violate Swiss law."

Ohio argues that (the language of the orders apparently aside) the district court has left a "door . . . open" to Andersen by having expressed during a hearing a willingness to consider expert testimony concerning Swiss law (Brief, pp. 8, 10-11). Had the district court in fact included *in its orders* language capturing the sense of these remarks, language to the effect that Andersen need only exert its best efforts to produce, consistent with the dictates of Swiss law, and/or language to the effect that the court, in monitoring the progress of the dispute, would take into consideration the requirements and prohibitions of Swiss law, this case would not be here: for, contrary to Ohio's representations to this Court (Brief, p. 6), Andersen's position has been, and remains, that it *will* exert every effort to effect the *lawful* production of the Geneva documents and that the court rightfully *can* "compel Andersen to do *whatever is lawfully permissible.*" (Petition, p. 10; emphasis in original). But the orders simply do not contain any such language; and, certainly, if the question presented by Andersen's Petition is otherwise deserving of review by this Court, the Petition should not be denied on the *assumption* or *speculation* that the district court meant something other than, and inconsistent with, what it said in its orders. Indeed, any such speculation would be unwarranted in view of the following statement by the district court:

*Ohio's representation to this Court that the district court "modified its initial ruling by [merely] directing Andersen to exert every effort" (Brief, p. 2) is flatly wrong (see, *e.g.*, Appendix H to Andersen's Petition).

"This Court is not of a view to establish or supervise a detailed blueprint for the discovery procedures in this regard." (Order of June 25, 1976, Appendix F to Petition, p. 78).

The Court of Appeals for the Tenth Circuit had no difficulty in recognizing that in fact the district court's orders unqualifiedly had directed Andersen to violate foreign law. For example, in rejecting certain of Andersen's arguments that court stated "we are not impressed by Andersen's contention that international comity prevents *a domestic court from ordering action which violates foreign law*" (December 1, 1976 Opinion of the Court of Appeals, Appendix B to Petition, p. 27; emphasis added), and in affirming the entry of the discovery orders the court held, "foreign law may not control local law. It cannot invalidate an order which local law authorizes" *(ibid.)*.

In sum, Ohio's suggestion to this Court that the discovery orders in question do not constitute final, and adverse, rulings on, and repudiations of, Andersen's foreign law claims is based upon a mis-statement of the record.

II. The Question Of Andersen's Good Faith And The Question Of What Sanctions May Be Imposed Upon Andersen By The District Court Are Both Irrelevant To The Question Andersen Requests This Court To Review

Ohio — anxious to avoid having this Court consider on the merits the substantive question Andersen's Petition presents for review — argues that any consideration of this question must be deferred pending further proceedings in the trial court. Thus, Ohio would have it that Andersen may not dispute the validity of the trial court's discovery orders until it has demonstrated its "good faith" by acting in compliance with the orders, *i.e.*, "a party may [not] assert

anti-disclosure laws as grounds for refusing to comply with discovery orders without first showing that it has exerted in good faith every effort to comply [with those orders] . . ." (Brief, p. 2). Relatedly, Ohio contends that the trial court's decision of Ohio's motion to impose sanctions upon Andersen somehow will illuminate the merits of the question presented (Brief, p. 17), and that, therefore, Andersen must delay exercising its rights to challenge orders which it believes are invalid until it has disobeyed them and been cited for contempt for so doing.

Contrary to Ohio's bald assertions of "tactics of avoidance" on Andersen's part, the record here strongly supports the finding that, while exercising in an orderly fashion its rights to challenge on appeal the validity of the district court's orders, Andersen, at the same time, has evidenced "good faith" through its efforts to comply with the court's peremptory orders (to the extent possible under Swiss law). Thus, the substantial progress in limiting the scope of this dispute which has been achieved since the entry of the district court's orders has resulted from *Andersen's* ongoing and, in effect, voluntary efforts to attempt to resolve the matter. This fact alone provides substantial evidence of Andersen's good faith and distinguishes Andersen's posture from that usually assumed by a party-litigant who is challenging the validity of a discovery order on appeal. Unlike the litigant who objects to a discovery order, appeals from its entry, and refuses to produce any of the material in question until its appellate recourse has been exhausted, even after Andersen had filed its several appeals and petition for writ of mandamus and prohibition and had secured from the Court of Appeals a stay of the discovery orders, it continued to "exert its efforts" to comply with those orders and, in fact, has complied to the full extent it is able to do so without violating the criminal law of Switzerland. Such efforts are continuing.

But Ohio's attempt to litigate the question of good faith at this stage of the proceedings is most fundamentally meaningless because that question simply is not relevant to the question raised by Andersen's Petition. Simply put, the district court's orders either are, or are not, lawful for reasons having nothing to do with whether Andersen's actions following the entry of those orders do, or do not, satisfy Ohio's arguments in respect of "good faith." For, if Andersen's position that the very entry of the discovery orders *directing a violation of Swiss law* was error and an abuse of power is correct, such error is not erased nor such abuse corrected by anything Andersen may, or may not, have done following the entry of the orders.

Nor is there any logic in claiming, as Ohio does (Brief, p. 2) that the invalidity of the discovery orders in issue can be asserted *only after* the party subject to the orders has attempted to comply with them.

This proposition makes sense only insofar as it suggests that, in the exercise of good faith, a party should make efforts to resolve a dispute by whatever *lawful* recourse is available even when the dispute has been precipitated by the entry of orders unlawful on their face. Thus, Andersen here has instituted and carried out and is continuing *lawful* practices intended to ameliorate the controversy. But surely —and particularly when, as here, it appears likely that the dispute cannot be mooted by such voluntary efforts—Andersen cannot fairly be barred—until it has exhausted completely all voluntary good faith efforts—from pursuing, in timely fashion, its rights to challenge such unlawful orders on appeal.

Ohio apparently counters these claims with its contention that Andersen's Petition, nonetheless, is made premature by the "common sense of the *Alexander* doctrine," Brief, p. 10—*i.e.*, the holding in *Alexander v. United States*, 201 U.S. 117 (1906), that a discovery order ordinarily is

not appealable in the absence of the imposition of a contempt citation upon the party objecting to the order. But the cases are legion in which appellate courts *have entertained* and *granted* petitions for writs of mandamus seeking to have unlawful discovery orders vacated, without considering at all the so-called contempt requirement. See, *e.g.*, *Sanderson v. Winner*, 507 F.2d 477 (10th Cir. 1974), *cert. denied*, 421 U.S. 914 (1975); *Pfizer, Inc. v. Lord*, 456 F.2d 545 (8th Cir. 1972); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348 (1971); *United States v. Hemphill*, 369 F.2d 539 (4th Cir. 1966). And, while in *Kerr v. United States District Court*, ... U.S. ...., 48 L.Ed. 2d 725 (June 14, 1976), this Court stressed the extraordinary nature of the remedy of a writ of mandamus it nowhere suggested that an otherwise meritorious petition challenging an unlawful discovery order should be denied because there had been no contempt proceeding below.

In any event, adoption of the "contempt" requirement here simply would serve no purpose—other than the negative one of delaying the resolution of the substantive question which Andersen *now* requests this Court to make until all parties and the trial court have spent valuable resources in the course of possibly extensive contempt hearings. The "contempt" rule may make sense when there is reason to put "a witness' [or party's] sincerity to the test of having to risk a contempt citation as a condition to appeal", *United States v. Fried*, 386 F.2d 691, 695 (2d Cir. 1967). Imposing stringent restrictions on the appealability of ordinary discovery orders similarly may make sense when to do otherwise would open appellate courts to an undesired "flood of appeals", *International Business Machines Corp. v. United States*, 480 F.2d 293, 298 (2d Cir. 1973). And, in certain cases, a contempt hearing might serve the useful purpose of supplementing a record which is incomplete. *United*

States v. Fried, supra, 386 F.2d at 695. But none of those circumstances is present here: as discussed above, p. 7, Andersen has amply demonstrated its "sincerity" by its willingness to work at the practicalities of complying with the district court's orders while concurrently challenging on appeal the validity of those orders; permitting appeal here would "open the door," if at all, to only that "small class of cases," to paraphrase *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949), in which parties and non-parties (here Andersen's personnel living and working in Switzerland) have been directed by a court of this country to violate the criminal laws of a friendly foreign country; and it is hard to imagine, for the reasons discussed above, pp. 7-9, how any hearings concerned with Andersen's alleged "bad faith" could supplement the record with anything of relevance to the question presented by Andersen's Petition.

Finally, Ohio's "prematurity" argument is in no way supported by its ostensible reliance (Brief, pp. 16-17) upon the following passage which it quotes from *Societe Internationale v. Rogers,* 357 U.S. 197, 208 (1958):

> "Whatever its reasons the petitioner did not comply with the production order. Such reasons, and the wilfulness or good faith of petitioner, can hardly affect the fact of non-compliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply."

Ohio suggests that these remarks reflect this Court's view that a district court requested to enter a discovery order with respect to discovery of documents or information located in a foreign country need not, indeed should not, consider any barriers to the effectuation of the requested discovery which the laws of that sovereignty may present until such time as the discovered party faces sanctions for its non-compliance. Those portions of the Court's holding in *Societe*

Internationale which are relevant to the question presented by Andersen's Petition, and which are discussed therein, pp. 14-15, establish, however, that Ohio's proffered interpretation of this single excerpt is mistaken. When read in context it is evident that the Court's quoted language (extracted by Ohio from Part II of the opinion, *Societe Internationale v. Rogers, supra,* 357 U.S. at 206-208) was directed only to the question of whether a district court derived its authority to dismiss a complaint for failure of a plaintiff to comply with a production order, from the former Rule 37, F.R. Civ. P., or from Rule 41(b), F.R. Civ. P.

CONCLUSION

For the reasons set forth above and in Andersen's Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit, the Petition should be granted.

Respectfully submitted,

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